5-28-2010

Patterson v. State, Dept. of Health Clerk's Record v. 5 Dckt. 37416

Vol. 5 of 5

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

LYNETTE PATTERSON,

PLAINTIFF-APPELLANT,

vs.

STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I through X, whose true identities are presently unknown,

DEFENDANTS-RESPONDENTS.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon MICHAEL MCLAUGHLIN, *District Judge*

JASON R.N. MONTELEONE

Attorney for Appellant

BRIAN B. BENJAMIN
Deputy Attorney General

Attorney for Respondent

VOLUME V

37196

TABLE OF CONTENTS.....PAGE NO.

VOLUME I

VOLUME II

TABLE OF CONTENTS.....PAGE NO.

VOLUME III

VOLUME IV

TABLE OF CONTENTS.....PAGE NO.

VOLUME V

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

promoted to the position of correctional counselor. Mackey testified in her deposition that she believed she failed to receive a promotion to that position because she was not sexually involved with Kuykendall.

In addition, Brown repeatedly interrogated Mackey about her statements to the internal affairs investigator and attempted to contact Mackey outside of work. Stress led to health problems, and Mackey was unable to work between August 1998 and January 1999. Upon her return to work, Mackey was demoted and suffered further mistreatment and humiliation. A few months later she resigned, finding the conditions of employment intolerable. Mackey filed a government tort claim with the Department in February 1999 and filed a complaint with the Department of Fair Employment and Housing in March 1999. Mackey joined Miller in filing suit on June 15, 1999, alleging, among other claims, sexual discrimination and retaliation in violation of the FEHA.

C

As noted, defendants moved for summary judgment or summary adjudication of issues. The trial court determined the evidence of the warden's sexual favoritism did not constitute discrimination or harassment under the FEHA and rejected plaintiffs' retaliation claim. Miller's cause of action for disability discrimination survived, but summary adjudication **[**86]** in favor of defendants was awarded on the remaining claims. Miller subsequently dismissed her complaint with its single remaining cause of action for disability discrimination; the court entered judgment in favor of defendants, and plaintiffs appealed.

The Court of Appeal affirmed, concluding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, nonfavored employees. According to the Court of Appeal, plaintiffs were in the same position as male employees who failed to acquire the benefits that Kuykendall accorded to Bibb, Patrick, and Brown. With respect to the claim that Kuykendall's behavior created an actionable hostile work environment, the appellate court observed: "Ignoring for the moment evidence of retaliation for threatened, or actual, reporting of the relationships, plaintiffs have demonstrated unfair conduct in the workplace by virtue of Kuykendall's preferential treatment of his various sexual partners. However, beyond the fact of those relationships and the preferential treatment, plaintiffs have not shown a concerted pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex. Plaintiffs **[*460]** were not themselves subjected to sexual advances, and were not treated any differently than male employees at [the prison]. Hence the trial **[***809]** court correctly concluded there is no evidentiary basis for plaintiffs' various sex discrimination and harassment claims."

With respect to plaintiffs' claim that defendants retaliated against them because they protested practices forbidden by the FEHA, the Court of Appeal concluded that defendants properly had prevailed on plaintiffs' retaliation claim, evidently because the appellate court found the record demonstrated that plaintiffs did not exhibit a subjective belief, when they made their complaints, that they were reporting conduct prohibited by the FEHA or that they were complaining of sexual discrimination or sexual harassment.

II

A

CA(1)**(1)** We emphasize at the outset that the present case comes to us on appeal from a grant of summary judgment and summary adjudication. HN1A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case ... ." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [107 Cal. Rptr. 2d 617, 23 P.3d 1143].) HN2CA(2)**(2)** On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 [12 Cal. Rptr. 3d 615, 88 P.3d 517].)

B

The FEHA expressly prohibits sexual harassment in the workplace. [5] It is an unlawful **[**87]** employment practice HN3"[f]or an employer ... because of ... **[*461]** sex ... to harass an employee ... ." (Gov. Code, § 12940, subd. (j)(1).) The FEHA also provides that "[sexual] [h]arassment of an employee ... by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Ibid.*) For the purposes of the relevant provisions of the FEHA, HN4" 'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (*Id.*, § 12940, subd. (j)(4)(C).)

FOOTNOTES

[5] Plaintiffs asserted claims for sexual discrimination and sexual harassment under the FEHA. In their complaint, plaintiffs styled these claims as constituting a single cause of action, and the Court of Appeal treated them as such. As we noted in *Reno v. Baird* (1998) 18 Cal.4th 640, 646, 657 [76 Cal. Rptr. 2d 499, 957 P.2d 1333], however, claims for sexual discrimination and sexual harassment are distinct causes of action, each arising from different provisions of the FEHA.

Plaintiffs based their sexual discrimination and harassment claim on the same circumstances, and the thrust of their argument in the trial court, the Court of Appeal, and this court has been that they were subjected to sexual harassment. Observing that sexual harassment is a form of sexual discrimination (see *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 348 [21 Cal. Rptr. 2d 292], and cases cited; see also *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129 [87 Cal. Rptr. 2d 132, 980 P.2d 846] [harassment on the basis of race is a form of employment discrimination]), the Court of Appeal analyzed plaintiffs' claim principally under the law applicable to sexual harassment, and we shall do the same.

[*810]** CA(3)**(3)** HN5According to the Fair Employment and Housing Commission (FEHC), the agency charged with administering the FEHA, harassment on any basis prohibited by the FEHA includes (but is not limited to) *verbal harassment*, including "epithets, derogatory comments or slurs on a basis enumerated in the Act"; *physical harassment*, including "assault, impeding or

blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act"; and *visual harassment*, including "derogatory posters, cartoons, or drawings on a basis enumerated in the Act." (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A), (B) & (C).) The regulations also specify that "unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors" constitute harassment. (*Id.*, § 7287.6, subd. (b)(1)(D).) In the specific context of sexual discrimination, prohibited harassment may include "verbal, physical, and visual harassment, as well as unwanted sexual advances." (*Id.*, § 7291.1, subd. (f)(1).)

CA(4) (4) HN6 Past California decisions have established that the prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607–608 [262 Cal. Rptr. 842]; see also *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414–1415 [26 Cal. Rptr. 2d 116].) [6] Such a hostile environment **[*462]** may be created even if the plaintiff never is subjected to sexual advances. (*Mogilefsky v. Superior Court*, *supra*, 20 Cal.App.4th at pp. 1414–1415.) In one case, for example, a cause of action based upon a hostile environment was stated when the plaintiff alleged she had been subjected to long-standing ridicule, insult, threats, and especially exacting work requirements by male coworkers who evidently resented a female employee's entry into a position in law enforcement. (*Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at pp. 347–348.)

FOOTNOTES

[6] Some cases draw a sharp distinction between the two types of harassment, namely so-called quid pro quo and hostile work environment harassment. (See *Fisher v. San Pedro Peninsula Hosp.*, *supra*, 214 Cal. App. 3d at p. 607.) Later cases have acknowledged that the two theories of liability are intertwined. (See *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751 [141 L. Ed. 2d 633, 118 S. Ct. 2257]; *Mogilefsky v. Superior Court*, *supra*, 20 Cal.App.4th at p. 1415; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1005 [16 Cal. Rptr. 2d 787] [characterizing the two types of harassment as not distinct forms of harassment but "poles of a continuum"], disapproved on another point in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179].)

CA(5) **(5)** We have agreed with the United States Supreme Court that, HN7 to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. (See *Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at p. 130, relying upon *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [126 L. Ed. 2d 295, 114 S. Ct. 367].) The working environment must be evaluated in light of the totality of the circumstances: "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. **[***811]** **[**88]** These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Harris v. Forklift Systems, Inc.*, *supra*, 510 U.S. at p. 23.)

CA(6) **(6)** HN8 The United States Supreme Court has warned that the evidence in a hostile environment sexual harassment case should not be viewed too narrowly: "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] ... . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. ... The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81–82 [140 L. Ed. 2d 201, 118 S. Ct. 998]; see also *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517–518 [76 Cal. Rptr. 2d 547].)

[*463] Our courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII) for assistance in interpreting the FEHA and its prohibition against sexual harassment. (See *Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at pp. 129–130; *Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at p. 517.) Although the FEHA explicitly prohibits sexual harassment of employees, while Title VII does not, the two enactments share the common goal of preventing discrimination in the workplace. Federal courts agree with guidelines established by the Equal Employment Opportunity Commission (EEOC), the agency charged with administering Title VII, in viewing sexual harassment as constituting sexual discrimination in violation of Title VII. (See *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64–65 [91 L. Ed. 2d 49, 106 S. Ct. 2399].) In language comparable to that found in the FEHA and in FEHC regulations, federal regulatory guidelines define sexual harassment as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (29 C.F.R. § 1604.11(a)(3) (2004).)

A lengthy policy statement issued by the EEOC has examined the question of sexual favoritism, relying in part upon a number of federal court decisions that have considered the kind of harassment claim brought by plaintiffs, namely one based principally on the favoritism shown by supervisors to employees who are the supervisors' sexual partners. (Off. of Legal Counsel, Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism (Jan. 12, 1990) No. N-915-048 in 2 EEOC Compliance Manual foll. § 615 (EEOC Policy Statement No. N-915-048.) In its 1990 policy statement, the EEOC observed that, although isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending **[***812]** the demeaning message that managers view female employees as " 'sexual playthings' " or that "the way for women to get ahead in the workplace is by engaging in sexual conduct." [7] We believe the policy statement provides a useful guide in evaluating the issue before us.

FOOTNOTES

[7] The policy statement was issued in 1990 by the EEOC and specifies that it was approved by Clarence Thomas—then the Chairperson of the EEOC and now an Associate Justice of the United States Supreme Court.

The EEOC policy statement is entitled Policy Guidance on Employer Liability under Title VII for Sexual Favoritism. It covers three topics: isolated favoritism, favoritism **[**89]** when sexual favors have been coerced, and widespread favoring of consensual sexual partners. The policy statement begins with an explanation that "[a]n *isolated* instance of favoritism toward a 'paramour' (or **[*464]** a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. [Fn. omitted.] A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman." (EEOC Policy Statement No. N-915-048, *supra*, § A, italics added.) [8]

FOOTNOTES

[8] This portion of the EEOC policy statement reflects the position of a great majority of federal courts. (See *DeCintio v. Westchester County Medical Center* (2d Cir. 1986) 807 F.2d 304, 308; see also *Schobert v. Illinois Dept. of Transp.* (7th Cir. 2002) 304 F.3d 725, 733; *Womack v. Runyon* (11th Cir. 1998) 147 F.3d 1298, 1300; *Taken v. Oklahoma Corp. Com'n.* (10th Cir. 1997) 125 F.3d 1366, 1369–1370.)

The policy statement next explains the commission's position with respect to *coerced* sexual activity, including the situation in which the coercion results in employment benefits for a victim who is not complaining. Because coercion is not alleged in the present case, this element of the policy statement is not relevant to the question before us.

Finally, the EEOC discusses sexual favoritism that is more than isolated and that is based upon consensual affairs: "If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is 'sufficiently severe or pervasive "to alter the conditions of [their] employment and create an abusive working environment." ' [Citations.] [Fn. omitted.] An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them. [Citations.]" (EEOC Policy Statement No. N-915-048, *supra*, § C.)

In addition, according to the EEOC, "[m]anagers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in **[***813]** sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. [Fn. omitted.] This can form the basis of an implicit 'quid pro quo' harassment claim for **[*465]** female employees, as well as a hostile environment claim for both women and men who find this offensive." (EEOC Policy Statement No. N-915-048, *supra*, § C.)

To illustrate its point, the EEOC discussed *Broderick v. Ruder* (D.D.C. 1988) 685 F. Supp. 1269, in which the court concluded sexual favoritism contributed to a hostile work environment that violated Title VII. The plaintiff, in that case an attorney, alleged that two of her supervisors had given employment benefits to two secretaries with whom they were conducting sexual affairs and that another supervisor favored an attorney because of his sexual attraction to her. As the EEOC also noted, there were "isolated" unwanted sexual advances made to the plaintiff. The EEOC stressed the court's discussion of sexual favoritism in the workplace, which "undermined plaintiff's motivation and work performance and deprived plaintiff, and other ... female employees, of promotions and job opportunities." (*Broderick v. Ruder, supra*, 685 F. Supp. at p. 1278; EEOC Policy Statement No. N-915-048, *supra*, § C.) The EEOC policy statement commented that, although the *Broderick* decision turned upon a hostile work environment analysis, the facts also could have supported an implied quid **[**90]** pro quo claim "since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct. [Citations.]" (*Ibid.*)

The one pertinent California decision generally indicates that the standards and reasoning embodied in the EEOC policy statement provide appropriate guidelines in interpreting and applying the relevant provisions of the FEHA. In *Proksel v. Gattis* (1996) 41 Cal.App.4th 1626 [49 Cal. Rptr. 2d 322], although the court rejected a claim based upon favoritism arising from a single affair in a small office, it recognized sexual favoritism *could* create a hostile environment. In dictum, the court in *Proksel* suggested that sexual favoritism by a manager may be actionable when it leads employees to believe that "they [can] obtain favorable treatment from [the manager] if they became romantically involved with him" (*id.* at p. 1629), the affair is conducted in a manner "so indiscreet as to create a hostile work environment," or the manager has engaged in "other pervasive conduct ... which created a hostile work environment." (*Id.* at pp. 1629–1630.) The Court of Appeal in *Proksel* cited the *Broderick* decision (*Broderick v. Ruder, supra*, 685 F. Supp. 1269) and another federal court decision suggesting that overt manifestations of sexual favoritism may create a hostile work environment in violation of Title VII when they convey the message that a woman cannot be "evaluated on grounds other than her sexuality." (*Drinkwater v. Union Carbide Corp.* (3rd Cir. 1990) 904 F.2d 853, 862; see *id.* at p. 861, fn. 15.) Indeed, the concept of conduct that gives rise to a hostile work environment by creating a work *atmosphere* that is demeaning to women is not new. (See Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(C) [stating that harassment may **[*466]** include the posting of derogatory images]; *Accardi v. Superior Court, supra*, 17 Cal.App.4th at pp. 347–348; *EEOC v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 897 & fn. 3 [recognizing demeaning gender-based conduct as sexual harassment]; *Lipsett v. University of Puerto Rico* (1st Cir. 1988) 864 F.2d 881, 905 [recognizing the posting of lurid images as sexual harassment].)

[*814]** CA(7) **(7)** Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that HN9 an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment. (See *Aguilar v. Avis Rent A Car System, Inc., supra*, 21 Cal.4th at p. 130.) Furthermore, applying this standard to the circumstances of the present case, we conclude that the evidence proffered by plaintiffs, viewed in its entirety, established a prima facie case of sexual harassment under a hostile-work-environment theory. As we shall explain, a trier of fact reasonably could find from the evidence in the record set forth below that a hostile work environment was created in the workplace in question.

C

Over a period of several years, Warden Kuykendall engaged concurrently in sexual affairs with three subordinate employees, Bibb, Patrick, and Brown. There was evidence these affairs began in 1991 and continued until 1998. The affairs occurred first while

Kuykendall and the women worked at CCWF, then continued when these individuals all transferred to VSPW. Kuykendall served in a management capacity at both institutions and served as warden at VSPW. When Kuykendall transferred from CCWF to VSPW, there was evidence he caused his sexual partners to be transferred to the new institution to join him. There was evidence Kuykendall promised and granted unwarranted and unfair employment benefits to the three women. One of the unfair employment benefits granted to Brown evidently was the power to abuse other employees who complained concerning the affairs. When plaintiffs complained, they suffered retaliation (and they believed two other employees were similarly targeted). Kuykendall refused to intervene and himself retaliated by withdrawing **[**91]** previously granted accommodations for Miller's disability after she cooperated with the internal affairs investigation.

Further, there was evidence that advancement for women at VSPW was based upon sexual favors, not merit. For example, Kuykendall pressured Miller and other employees on the personnel selection committee to agree to transfer Bibb to VSPW and promote her to the position of correctional counselor, despite the conclusion of the committee that she was not eligible **[*467]** or qualified. Committee members were told to set aside their professional judgment because Kuykendall wanted them to "make it happen."

In addition, on two occasions Kuykendall promoted Brown to facility captain positions in preference to Miller, although Miller was more qualified. Brown enjoyed an unprecedented pace of promotion to the managerial position of associate warden, causing outraged employees to ask such questions as, "What do I have to do, 'F' my way to the top?" Even Brown acknowledged that affairs between supervisors and subordinates were common in the Department and were widely viewed as a method of advancement. Indeed, Brown made it known to Miller that the facility captain promotion belonged to her because of her intimate relationship with Kuykendall, announcing that if she were not awarded the promotion she would "take him [Kuykendall] down" because she "knew every scar on his body."

There also was evidence that Kuykendall promoted Bibb from clerical to correctional staff duties despite her lack of qualifications, and at the same time refused to **[***815]** permit Mackey to secure the on-the-job training that would have enabled her to make a similar advance. On the basis of her knowledge of Kuykendall's sexual affairs, Mackey believed the reason he denied her this opportunity was that she was not his sexual partner.

The evidence suggested Kuykendall viewed female employees as "sexual playthings" and that his ensuing conduct conveyed this demeaning message in a manner that had an effect on the work force as a whole. Various employees, including plaintiffs, observed Kuykendall and Bibb fondling one another on at least three occasions at work-related social gatherings. One employee reported that Kuykendall had placed his arm around her and another female employee during one such social event, adding that Kuykendall had engaged in unwelcome fondling of her as well. Bibb and Brown bragged to other employees, including plaintiffs, of their power to extort benefits from Kuykendall. Jealous scenes between the sexual partners occurred in the presence of Miller and other employees. Several employees informed the internal affairs investigator that persons who were engaged in sexual affairs with Kuykendall received special benefits. When Miller last complained to Kuykendall, he told her that Brown was manipulative, adding he was "finished" with Brown and should have chosen Miller—a comment Miller reasonably took to mean that he should have chosen Miller for a sexual affair.

There was evidence Kuykendall's sexual favoritism not only blocked the way to merit-based advancement for plaintiffs, but also caused them to be subjected to harassment at the hands of Brown, whose behavior Kuykendall refused or failed to control even after it escalated to physical assault. This **[*468]** harassment, apparently retaliatory, included loss of work responsibilities, demeaning comments in the presence of other employees, loss of entitlement to a pay enhancement and to disability accommodation, and physical assault and false imprisonment. Kuykendall explained to Miller that, because of his intimate relationship with Brown, he would not protect plaintiffs. In this manner, his sexual favoritism was responsible for the continuation of an outrageous campaign of harassment against plaintiffs.

CA(8)**(8)** Considering all the circumstances "from the perspective of a reasonable person in the plaintiff's position" (*Oncale v. Sundowner Offshore Services, Inc.*, *supra*, 523 U.S. at p. 81), and noting that the present case is before us on appeal after a grant of summary judgment, we conclude that the foregoing evidence created at least a triable issue of fact on the question whether Kuykendall's conduct constituted sexual favoritism widespread enough to constitute a hostile work environment in which the "message **[**92]** [was] implicitly conveyed that the managers view women as 'sexual playthings' " or that "the way for women to get ahead in the workplace is by engaging in sexual conduct" thereby "creating an atmosphere that is demeaning to women." (EEOC Policy Statement No. N-915-048, *supra*, § C.) In terms we previously have borrowed from the United States Supreme Court in measuring sexual harassment claims, there was evidence of " 'sufficiently severe or pervasive' " conduct that " ' "alter[ed] the conditions of [the victims'] employment" ' " such that a jury reasonably could conclude that the conduct created a work environment that qualifies as hostile or abusive to employees because of their gender. (*Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at p. 130.)

D

In reaching its contrary conclusion, the Court of Appeal essentially conceded **[***816]** that widespread sexual favoritism *could* support a claim for sexual harassment if the accompanying conduct were sufficiently pervasive or severe, but concluded plaintiffs had failed to make an adequate showing in this respect, especially in the absence of any evidence that they had been sexually propositioned or that the sexual affairs were nonconsensual. But California law (like the EEOC policy statement quoted above) provides that plaintiffs may establish the existence of a hostile work environment even when they themselves have not been sexually propositioned. (*Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at p. 519; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal. App. 3d at pp. 610–611; EEOC Policy Statement No. N-915-048, *supra*, § C, example 3.) Further, as the EEOC policy statement points out, even widespread favoritism based upon *consensual* sexual affairs may imbue the workplace with an atmosphere that is demeaning to women because a message is conveyed that managers view women as **[*469]** "sexual playthings" or that the way required to secure advancement is to engage in sexual conduct with managers. In focusing upon the question whether the sexual favoritism was coercive, the Court of Appeal overlooked the principle that even in the absence of coercive behavior, certain conduct creates a work atmosphere so demeaning to women that it constitutes an actionable hostile work environment.

The Court of Appeal commented that the *Broderick* and *Drinkwater* decisions discussed not only evidence of widespread sexual favoritism but also the assertedly coercive effect of a supervisor's sexual advances to the plaintiff and of a generally sexually charged atmosphere. In *Broderick*, the court referred to pervasive "conduct of a sexual nature" and noted isolated instances in which sexual advances were made upon the plaintiff, but it also observed that the more important consideration was the effect of sexual favoritism on the work *environment*. (*Broderick v. Ruder*, *supra*, 685 F. Supp. at p. 1278.) Similarly, in *Drinkwater* the court, although referring

to an atmosphere of "sexual innuendo" or a "sexually charged" work atmosphere created by a sexual affair, also explained that "[t]he theoretical basis for the kind of environmental claim alleged here is that the sexual relationship impresses the workplace with such a cast that the plaintiff is made to feel that she is judged only by her sexuality." (*Drinkwater v. Union Carbide Corp., supra*, 904 F.2d at p. 861 & fn. 15.) Again, the important and underlying inquiry in these cases was whether the conduct in question conveyed a message that demeans employees on the basis of their sex.

Putting aside the question whether the *Broderick* and *Drinkwater* cases properly can be distinguished from the circumstances of the present case, we believe it is clear under California law that a plaintiff may establish a hostile work environment without demonstrating the existence of coercive sexual conduct directed at the plaintiff or even conduct of a sexual nature. (See *Beyda v. City of Los Angeles, supra*, 65 Cal.App.4th at p. 519 [" 'The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others' "]; *Accardi v. Superior Court, supra*, 17 Cal.App.4th at p. 345 [sexual harassment under a hostile-work-environment theory "does not necessarily involve sexual conduct. **[**93]** It need not have anything to do with lewd acts, double entendres or sexual advances"]; see also *Oncale v. Sundowner Offshore Services, Inc., supra*, 523 U.S. at p. 80 ["harassing conduct need not be motivated by sexual desire"]; **[***817]** *Mogilefsky v. Superior Court, supra*, 20 Cal.App.4th at p. 1414; 2 Chin et al., Cal Practice Guide: Employment Litigation (The Rutter Group 2004) ¶¶ 10:240–10:246, pp. 10-40 to 10-41.) Finally, we believe that even those courts focusing on a "sexually charged environment" would be satisfied that a triable issue of fact was presented by the evidence in this case, in view of the bragging, squabbling, and fondling that occurred.

[*470] We stress that, because this is an appeal from a grant of summary judgment in favor of defendants, a reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party. (*Wiener v. Southcoast Childcare Centers Inc., supra*, 32 Cal.4th at p. 1142.) We believe the Court of Appeal failed to draw such inferences and took too narrow a view of the surrounding circumstances. (See *Oncale v. Sundowner Offshore Services, Inc., supra*, 523 U.S. at pp. 81–82; see also *Beyda v. City of Los Angeles, supra*, 65 Cal.App.4th at pp. 517–518; *Accardi v. Superior Court, supra*, 17 Cal.App.4th at pp. 350–351.)

Defendants attempt to counter plaintiffs' claims by referring to a number of the cases holding that isolated preferential treatment of a sexual partner, *standing alone*, does not constitute sexual discrimination. (See fn. 8, *ante*, at p. 464.) The Court of Appeal also cited these cases. In such instances, the discrimination is said to turn merely on personal preference, and male and female nonfavored employees are equally disadvantaged. Although we do not dispute the principle stated by these cases, we believe the Court of Appeal and defendants err in equating the present case with those cases. Whether or not Kuykendall was motivated by personal preference or by discriminatory intent, a hostile work environment was shown to have been created by widespread favoritism. As discussed, plaintiffs in the present case alleged far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner. They proffered evidence demonstrating the effect of widespread favoritism on the work environment, namely the creation of an atmosphere that was demeaning to women. Further, as the EEOC policy statement observes, an atmosphere that is sufficiently demeaning to women may be actionable by both men and women.

Defendants urge that, in the asserted absence of evidence that Kuykendall flaunted his consensual sexual affairs, coerced or sought to derive advantage from other employees in connection with them, or engaged in "open sexual conduct, sexual discussions, or other indiscreet behavior in the workplace," the facts of the present case show nothing more than the kind of standard sexual favoritism claim that has been rejected as a basis for liability under the FEHA and Title VII. We disagree. Again, defendants have overlooked the circumstance that widespread sexual favoritism may be actionable because of the effect it has on the work environment.

Further, we question the factual premise of defendant's argument. There was evidence of considerable flaunting of the relationships affecting the workplace, consisting of Bibb's and Brown's bragging and the jealous scenes between these two women, along with Kuykendall's indiscreet behavior at a number of work-related social gatherings. The favoritism that ensued from the sexual affairs also was on public display, reflected in Kuykendall's **[*471]** **[***818]** permitting Brown to abuse plaintiffs, his directive to the interview committee to promote Bibb, and his repeated admissions that he would not or could not control Brown because of his sexual relationship with her. It may even be inferred that Kuykendall solicited sexual favors in return for employment benefits, in light of Bibb's and Brown's boasts, the sequence of promotions awarded by Kuykendall, and his comment to Miller, "I should have chose[n] you."

[94]** To the extent defendants' contention is that a reasonable person in plaintiffs' position would not have found the work environment to have been hostile toward women on the basis of widespread sexual favoritism, we conclude that the lower courts erred in precluding plaintiffs from presenting this issue to a jury. The internal affairs investigation within the Department confirmed that Kuykendall's sexual favoritism occurred and was broadly known and resented in the workplace, and that several employees—including Brown—concluded that engaging in sexual affairs was the way required to secure advancement. There was evidence from which a jury reasonably could conclude that the entire scheme of promotion at VSPW was affected by Kuykendall's favoritism.

Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and Kuykendall's admission he could not control Brown because of his sexual relationship with her—a matter confirmed by the Department's internal affairs report. Indeed, it is ironic that, according to defendants, a jury should not be permitted to consider evidence of widespread sexual favoritism that the Department itself found convincing.

Finally, defendants warn that plaintiffs' position, if adopted, would inject the courts into relationships that are private and consensual and that occur within a major locus of individual social life for both men and women—the workplace. According to defendants, social policy favors rather than disfavors such relationships, and the issue of personal privacy should give courts pause before allowing claims such as those advanced by plaintiffs to proceed. Defendants urge it is safer to treat sexual favoritism as merely a matter of personal preference, and to recall that the FEHA is not intended to regulate sexual relationships in the workplace, nor to establish a civility code governing that venue.

CA(9) **(9)** We do not believe that defendants' concerns about regulating personal relationships are well founded, because it is not the relationship, but its effect **[*472]** on the workplace, that is relevant under the applicable legal standard. Thus, we have not discussed those interactions between Kuykendall and his sexual partners that were truly private. Moreover, the FEHA already clearly contemplates some intrusion into personal relationships. Specifically *HN10* the FEHA recognizes that sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon an asserted quid pro quo.

III

As noted, plaintiffs also alleged a cause of action for retaliation in violation of the FEHA.

CA(10)(10) HN11The FEHA protects employees against retaliation for filing a complaint or participating in proceedings or hearings under the act, or for opposing conduct made un **[***819]** lawful by the act. (Gov. Code, § 12940, subd. (h).) Specifically, section 12940, subdivision (h), declares that it is an unlawful employment practice for HN12any employer ... or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

CA(11)(11) This enactment aids enforcement of the FEHA and promotes communication and informal dispute resolution in the workplace. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476–477 [4 Cal. Rptr. 2d 522].) HN13Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action. (3 Cal.App.4th at p. 476.)

Miller asserted she engaged in protected activity in complaining about "improper relationships and sexual favoritism" and that "[w]hen Miller complained to Warden Tina **[**95]** Farmon about Kuykendall's affair with Bibb, when she complained to Gerald Harris about the Warden's [Kuykendall's] affairs and resulting harassment, when she complained to Brown about the affairs and resulting harassment, when she told Kuykendall of Brown's assault and battery on her, when she participated in Internal Affairs investigation, and when she subsequently wrote to Richard Ehle that [the Department] had failed to protect her after she testified, she was opposing the hostile work environment at [the Department] which resulted from the Warden's sexual favoritism." Miller added that she engaged in protected activity in seeking accommodation for her physical disability, and complained that the resulting accommodation was withdrawn after she cooperated in the internal affairs investigation.

[*473] Miller asserted that she suffered retaliation in a number of additional ways. She presented evidence that, in response to her complaints, supervisorial employees Brown and Yamamoto undermined her authority in various respects, publicly demeaned her, imposed additional onerous duties upon her, and subjected her to ostracism. Brown, a management employee, physically assaulted Miller in an effort to silence her, and threatened Miller with retribution as a result of Miller's cooperation with the internal affairs investigation. As previously noted, there was evidence that Kuykendall withdrew accommodations previously accorded Miller on account of her physical disability, and that he refused to curb Brown's abuse.

Plaintiff Mackey claimed she "engaged in protected activity under the FEHA when she complained on numerous occasions about what she and other women perceived to be a hostile work environment based on the sexual affairs of the Warden and the unchecked harassment suffered as a result of those affairs. In 1997, she discussed with her superior, Edna Miller, the harassment by Brown which went unchecked because of the Warden's affair with Brown. Miller then raised the issue with a sex harassment advisor Gerald Harris and with Warden Kuykendall. Mackey complained to chief deputy warden Vicky Yamamoto and to Warden Kuykendall about Brown's assault on Miller which resulted from Miller's stating she would report the affairs and favoritism, and neither Yamamoto nor Kuykendall took appropriate corrective action. In 1998, Mackey complained to Internal Affairs about the sexual affairs, favoritism and the unchecked harassment which resulted."

[*820]** Mackey claimed she suffered retaliation, providing evidence she was deprived of eligibility for a promotion, lost special pay for inmate contact, suffered ostracism, and was reassigned to tasks well below her capacity. She also alleged that Brown verbally abused and threatened her as a result of Mackey's cooperation with the internal affairs investigation.

Neither the trial court nor the Court of Appeal reached the question whether defendants had taken an adverse employment action against plaintiffs based on their complaints of sexual harassment, or the question whether there was a causal connection between the asserted protected activity and any adverse action, because each court determined that plaintiffs had failed to make a prima facie showing that they had engaged in protected activity by opposing sexual harassment that was prohibited by the FEHA.

The Court of Appeal acknowledged that, under certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 477 **[*474]** [the plaintiff may prevail "even if the harassment was not sufficiently severe or pervasive that it altered [the plaintiff's] work environment"]; *Moyo v. Gomez* (9th Cir. 1994) 40 F.3d 982, 985; *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1157.) An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination. (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 477; see also *E.E.O.C. v. Crown* **[**96]** *Zellerbach Corp.* (9th. Cir. 1983) 720 F.2d 1008, 1013, fn. 2.)

The Court of Appeal concluded, however, that although plaintiffs had opposed Kuykendall's conduct, they had not engaged in protected activity, because they had not expressed opposition to sex discrimination or sexual harassment. As the court understood the record, "[p]laintiffs were not complaining about sexual harassment but unfairness. This is not protected activity under the FEHA."

The appellate court faulted plaintiffs for not having complained to defendants "that the affairs and related conduct created an atmosphere whereby they felt they were being judged on their sexuality rather than on merit. Neither woman claimed to have been propositioned by a supervisor, expressly or impliedly, or to have been the subject of unwanted sexual attention. Neither woman claimed that the atmosphere had become so sexually charged that they could no longer do their work. Rather, plaintiffs' complaints and reports concerned the unfairness of promotions and other benefits given to paramours and the resulting mistreatment of them by those paramours." The Court of Appeal added that plaintiffs had not complained that they "were being forced to work in an atmosphere where they had to run a gauntlet of sexual abuse or where they were judged on their sexuality rather than on the merits. This is not a situation where plaintiffs honestly, but mistakenly, believed they were engaging in protected activity by reporting sexual harassment. Plaintiffs did not even attempt to report sexual harassment."

We have concluded *ante*, contrary to the determination of the Court of Appeal, that the conduct plaintiffs complained of *may* constitute sexual harassment **[***821]** in violation of the FEHA. We do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA. (See *Moyo v. Gomez, supra*, 40 F.3d at p. 985 [in analyzing retaliation claims, courts should recognize that plaintiffs have limited legal knowledge]; *Gifford v. Atchison, Topeka & Santa Fe Ry. Co., supra*, 685 F.2d at p. 1157 ["It requires a certain sophistication for an employee to recognize that an offensive employment practice may represent sex or race discrimination that is against the law"]; see also

Drinkwater v. Union Carbide Corp., supra, 904 **[*475]** F.2d at p. 866 [although the plaintiff's hostile work environment claim based upon isolated sexual favoritism did not survive summary judgment, her retaliation claim did—"[Union Carbide] is not free to retaliate against plaintiff simply because she has failed to build her sex discrimination claim properly," and she was not required "to guess the outcome of New Jersey law correctly"].) Furthermore, even if ultimately it is concluded defendants' conduct did not constitute a violation of the FEHA, we are not persuaded by defendant's claim that only an employee's mistake of fact, and not a mistake of law, may establish an employee's good faith but mistaken belief that he or she is opposing conduct prohibited by the FEHA. (See *Moyo v. Gomez, supra*, 40 F.3d at p. 985 [the employee's good faith "*reasonable* mistake may be one of fact or law"]; *Drinkwater v. Union Carbide Corp., supra*, 904 F.2d at p. 866 [sanctioning a retaliation claim in light of the plaintiff's reasonable belief concerning the law].)

Particularly in view of the EEOC policy statement quoted at length *ante*, whether or not a jury or a court ultimately concludes defendants' conduct constituted sexual harassment, employees such as plaintiffs reasonably could believe they are making a claim of sexual harassment in violation of the FEHA when they complain of sexual favoritism in their workplace. Although plaintiffs may not have recited the specific words "sexual discrimination" or "sexual harassment," the nature of their complaint certainly fell within the general purview of the FEHA, especially when we recall that this case is before us on review of a grant of summary judgment.

The FEHA's stricture against retaliation serves the salutary purpose of encouraging open communication between employees and employers so that employers can take voluntary steps to remedy FEHA violations (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 476), a result that will be achieved only if **[**97]** employees feel free to make complaints without fear of retaliation. The FEHA should be liberally construed to deter employers from taking actions that would discourage employees from bringing complaints that they believe to be well founded. The act would provide little comfort to employees, and thereby would fail in its ameliorative purpose, if employees feared they lawfully could lose their employment or suffer other adverse action should they fail to phrase accurately the legal theory underlying their complaint concerning behavior that may violate the act.

Similar concerns recently were expressed by the United States Supreme Court in commenting upon the need to protect whistleblowers who complained that a recipient of federal education funding intentionally discriminated on the basis of sex. (*Jackson v. Birmingham Bd. of Educ.* (2005) 544 U.S. 167 [161 L. Ed. 2d 361, 125 S. Ct. 1497].) The court concluded that Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq. **[***822]** (Title **[*476]** IX)) provides the whistleblower with a private right of action for retaliation. The high court, observing that Title IX would be unenforceable if persons feared retaliation in the event they complained concerning discriminatory practices, stated: "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.' [Citation.] We agree with the United States that this objective 'would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.' [Citation.] If recipients [of federal funds] were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result. [Citation.] [¶] Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." (*Jackson v. Birmingham Bd. of Educ., supra*, 544 U.S. at p. 180 [125 S. Ct. at p. 1508].)

Defendants contend, and the Court of Appeal apparently concluded, that plaintiffs did not demonstrate that at the time of their complaints they held a *subjective*, good faith belief that they were complaining about sexual harassment. They assume such a subjective mental state must be demonstrated even when a plaintiff is not relying upon a good faith mistake. Whether or not this assumption is accurate, we conclude that the subjective belief of the plaintiffs before us may be inferred from the nature and content of their repeated complaints. The issue of a plaintiff's subjective, good faith belief involves questions of credibility and ordinarily cannot be resolved on summary judgment. (See, e.g., *Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 477.)

Because the Court of Appeal concluded plaintiffs failed to establish that they were engaged in protected activity when they complained about potential sexual harassment, that court did not reach the question whether plaintiffs established a prima facie case on the remaining elements of their retaliation claim—specifically, whether plaintiffs suffered an adverse employment action in response to their sexual harassment complaints, and whether any adverse action was caused by their protected activity. [9] The court also did not reach defendants' claim that plaintiffs failed to file their administrative complaint within the period established by law. (See Gov. Code, § 12960, subd. (d) [plaintiffs must file their complaints with the FEHC within one year of the alleged unlawful employment practice].) We conclude it is appropriate to **[*477]** permit the Court of Appeal to address these questions in the first instance on remand.

FOOTNOTES

[9] The only aspect of the Court of Appeal's discussion that pertained to the issue of causation concerned Miller's claim of retaliation on the basis of her demand for disability accommodation.

IV

For the foregoing reasons, the judgment of the Court of Appeal is reversed to the extent **[**98]** it is inconsistent with our opinion, and the matter is remanded to the Court of Appeal for further proceedings consistent with this opinion.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STEVEN L. OLSEN
Chief of Civil Litigation
BRIAN B. BENJAMIN, ISB # 5422
KARIN D. JONES, ISB #6846
Deputy Attorneys General
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
brian.benjamin@ag.idaho.gov
Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

THE STATE OF IDAHO, IN AND FOR COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff, v. STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I THROUGH X, whose true identities are presently unknown, Defendants.	Case No. CV OC 07 17095 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S IHRA CLAIM**

COMES NOW Defendant State of Idaho, Department of Health and Welfare ("IDHW" or "the Department"), by and through its undersigned counsel of record, and hereby submits its Opposition to Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim ("Plaintiff's Motion for Reconsideration.")

I.

INTRODUCTION

In her Motion for Reconsideration, Plaintiff Lynette Patterson requests that this Court reconsider its Memorandum Decision on Defendant's Motion for Summary Judgment

("Memorandum Decision") of September 23, 2009, in which this Court granted Defendant IDHW's Motion for Summary Judgment. Specifically, Plaintiff asks this Court to reverse its dismissal of Plaintiff's claim of retaliation under the Idaho Human Rights Act ("IHRA"), Idaho Code § 67-5901 *et seq.*, arguing that "[t]here are factual disputes as to whether Defendant [sic] undertook a 'protected activity,' as defined under Title VII and the IHRA . . . and whether Plaintiff held a reasonable, good faith belief that she was engaging in protected activity . . .."[1] Plaintiff's Motion for Reconsideration, p. 3.

Defendant IDHW respectfully asserts that this Court correctly ruled that Plaintiff did not engage in a protected activity under the IHRA and that her claim under the IHRA was therefore appropriately subject to dismissal as a matter of law, pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure. Memorandum Decision, pp. 17-20. As discussed in detail below, the federal courts have overwhelmingly held that favoritism by a supervisor toward his or her paramour does not constitute gender discrimination or sexual harassment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*. Because the Idaho courts look to federal law in interpreting the provisions of the IHRA, Plaintiff was therefore not engaging in a protected activity when she discussed her concerns regarding the alleged favoritism of her supervisor, Mond Warren, toward a co-worker, Lori Stiles, purportedly stemming from a consensual romantic relationship.[2] In light of the voluminous legal precedent on the issue, Plaintiff's alleged belief that she was engaging in a protected activity was not objectively reasonable. The facts upon which Plaintiff relies do not demonstrate a genuine issue of material

---

[1] Plaintiff has not moved for reconsideration of this Court's dismissal of her claim under the Idaho Protection of Public Employees Act, Idaho Code § 6-2101 *et seq.*. See Memorandum Decision, pp. 7-17; Plaintiff's Motion for Reconsideration, p. 1.

[2] Defendant IDHW denies the existence of the alleged favoritism, but acknowledges that Mr. Warren and Ms. Stiles engaged in a consensual romantic relationship.

fact regarding the question of the objective reasonableness of Plaintiff's purported belief. In sum, Defendant IDHW respectfully requests that this Court affirm its Memorandum Decision.

II.

STANDARD OF REVIEW

Whether to grant or deny a request for reconsideration generally rests within the discretion of the district court. Slaathaug v. Allstate Ins. Co., 132 Idaho 705, 979 P.2d 107 (1999); Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 654, 827 P.2d 656, 667 (1992).

"Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 206 P.3d 481, 487 (Idaho 2009); see I.R.C.P. 56(c). The nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). "[T]he opposing party's case must not rest on mere speculation. A mere scintilla of evidence is not enough to create a genuine issue of fact." Tingley v. Harrison, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994).

II.

ARGUMENT

In its Memorandum Decision, this Court correctly held that Plaintiff did not engage in a protected activity under the IHRA. Memorandum Decision, pp. 17-20. This Court's ruling is supported by overwhelming case law and by the facts in the record – including the "new" facts Plaintiff presents in conjunction with her Motion for Reconsideration. Accordingly, Plaintiff

respectfully requests that the Court deny Plaintiff's Motion for Reconsideration and affirm its prior ruling.

A. Plaintiff Bears the Burden of Proving That She Engaged in a Protected Activity as an Essential Element of a *Prima Facie* Case of Retaliation Under the IHRA

With respect to the IHRA, the Idaho Supreme Court has held: "The legislative intent reflected in I.C. § 67-5901 allows our state courts to look to federal law for guidance in the interpretation of the state provisions." Foster v. Shore Club Lodge, Inc., 127 Idaho 921, 925, 908 P.2d 1228, 1232 (1995); see also O'Dell v. Basabe, 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991). Accordingly, as this Court noted in its Memorandum Decision, the Court's interpretation of the IHRA's retaliation provisions is guided by federal case law regarding the retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a). See Banks v. Pocatello Sch. Dist. No. 25, 429 F.Supp.2d 1197, 1200 n.3, 1203 (D.Idaho 2006); Bowles v. Keating, 100 Idaho 808, 812, 606 P.2d 458, 462 (1979); Memorandum Decision, p. 17. To prevail on her retaliation claim under the IHRA, Plaintiff must prove that: (1) **she engaged in a protected activity under Idaho Code § 67-5911**; (2) IDHW subjected her to an adverse employment action; and (3) a causal link existed between the protected activity and the subsequent adverse action. See Banks, 429 F.Supp.2d at 1203; Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1108 (9th Cir. 2008); Memorandum Decision, p. 17.

As discussed in further detail below, and as this Court correctly held in its Memorandum Decision, Plaintiff did not engage in a protected activity under the IHRA. See Memorandum Decision, pp. 17-20. Accordingly, the Court's decision to grant IDHW's Motion for Summary Judgment was correct, because "the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which the party will bear the burden of proof at trial." Baxter v. Craney, 135

Idaho 166, 170, 16 P.3d 263, 267 (2000); see also Memorandum Decision, p. 6, *citing to* Pounds v. Denison, 120 Idaho 425, 426 816 P2d 982, 983 (1991) ("[T]he existence of disputed facts will not defeat summary judgment when the Plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case . . .") Plaintiff's failure to "make a showing sufficient to establish the existence" of a genuine issue of material fact regarding the essential element of her involvement in a protected activity under the IHRA renders summary judgment in favor of Defendant IDHW wholly appropriate. Id.

B. Plaintiff Did Not Engage in a Protected Activity Under the IHRA

In her Motion for Reconsideration, Plaintiff asserts:

> There are factual disputes as to whether Defendant [sic] undertook a "protected activity," as defined under Title VII and the IHRA and as interpreted by various courts in reviewing claims brought pursuant to these statutes, and whether Plaintiff held a reasonable, good faith belief that she was engaging in protected activity, when she voiced concerns about the intra-office, romantic affair occurring between Mond Warren and Lori Stiles in Defendant's workplace.

Plaintiff's Motion for Reconsideration, p. 3.

Plaintiff, seeking a second bite at the apple, asks the Court to revisit its evaluation of this issue and attempts to demonstrate the existence of a factual issue by submitting a new Affidavit from the Plaintiff. Notably, none of the information contained in the Affidavit of Lynette Patterson in Support of Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim ("Plaintiff's Affidavit") involves "newly discovered evidence." See Plaintiff's Motion for Reconsideration, p. 2 (Plaintiff asserting that "[r]econsideration is appropriate, if the district court . . . is presented with newly discovered evidence"); Plaintiff's Affidavit (discussing Plaintiff's involvement in activities that took place between August 2004 and December 2006, well before the briefing on IDHW's Motion for Summary Judgment.)

Regardless, the facts to which Plaintiff points in support of her request that the Court overturn its prior ruling do not demonstrate the existence of a genuine issue of material fact that would warrant reversal of the Memorandum Decision. Plaintiff asserts that she subjectively believed that the conduct at issue violated the IHRA, but this alleged belief was not, as a matter of law, **reasonable**. The facts upon which Plaintiff relies do not create a factual issue regarding the **reasonableness** of Plaintiff's purported belief, as discussed in greater detail below.

1. Plaintiff's Purported Belief that the Conduct at Issue Violated the IHRA Was Not Reasonable in Light of Overwhelming Case Law to the Contrary

Overwhelming case law supports the conclusion that favoritism displayed towards a paramour in the workplace does not constitute sexual discrimination under Title VII – and thus under the IHRA. In the face of this overwhelming case law, it was not reasonable, as a matter of law, for Plaintiff to believe that such alleged conduct constituted unlawful activity under the IHRA.

a. *Federal Courts Have Consistently Held that Favoritism of a Paramour Does Not Violate Title VII*

As this Court stated in its Memorandum Decision: "Looking to federal law for guidance, this Court notes 'the great majority of courts' have found that 'favoritism for a paramour by [a] plaintiff's supervisor [does] not violate Title VII's prohibition of sexual discrimination." Memorandum Decision, p. 18, *quoting* Womack v. Runyon, 147 F.3d 1298, 1300-01 (11th Cir. 1998). This Court continued: "[F]avoritism for a co-worker or the co-worker's unit arising out of a sexual relationship is distinct from favoritism based on a preference for one sex or the other. Title VII's prohibition of sex discrimination 'is based on a person's sex, not on his or her sexual affiliations.' The Plaintiff appears to confuse two definitions of the word 'sex.'" Memorandum

Decision, p. 19, *quoting* DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 306-07 (2d. Cir. 1986).

Indeed, as the Court recognized, the overwhelming majority of federal courts have held that favoritism of a paramour in the workplace does not violate Title VII, because both males and females are equally affected by the alleged conduct (favoritism). As the Second Circuit Court of Appeals explained, with respect to favoritism stemming from a consensual, romantic relationship:

> Ryan's conduct, although unfair, **simply did not violate Title VII. Appellees were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour**. Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but Guagenti could be considered for the appointment because of Guagenti's special relationship to Ryan.

DeCintio, 807 F.2d at 307-08 (emphasis added). The Seventh Circuit Court of Appeals similarly held that:

> **Title VII does not, however, prevent employers from favoring employees because of personal relationships**. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification. From a practical standpoint, there is every reason for an employer to discourage this kind of intra-office romance, as it is often bad for morale, but **that is different from saying it violates Title VII**. Had there been other women in the sign shop, they would have suffered in exactly the same way [the male plaintiff] was allegedly suffering, which also shows why **this is not really a sex discrimination problem**.

Schobert v. Illinois Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002) (emphasis added) (internal citation omitted). Other federal courts have uniformly applied the same reasoning and holding: "[W]here an employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct, **Title VII is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee**."

Tenge v. Phillips Modern Agric. Co., 446 F.3d 903, 909 (8th Cir. 2006) (emphasis added); see also Preston v. Wis. Health Fund, 397 F.3d 539, 541 (7th Cir. 2005) ("Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination."); DeCintio, 807 F.2d at 306-07 (2d. Cir. 1986); Miller v. Aluminum Co. of Am., 679 F.Supp. 495, 501 (W.D.Pa. 1988), *aff'd mem.* 856 F.2d 184 (3d Cir. 1988); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); Ackel v. Nat'l Communications, Inc., 339 F.3d 376, 382 (5th Cir. 2003); Candelore v. Clark County Sanitation Dist., 752 F.Supp. 956, 960 (D.Nev. 1990), *aff'd mem.* 975 F.2d 588 (9th Cir. 1992); Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997); Womack, 147 F.3d at 1300-01 (11th Cir. 1998). "'Sex'" discrimination means discrimination **based on gender, not upon sexual activity or relationships**." Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (emphasis added).

As one federal district court noted, in referencing many of the above-listed cases and coming to the conclusion that a plaintiff could not bring a claim of Title VII sex discrimination regarding the consensual intra-office affair of two co-workers:

> **In addition to this mound of caselaw on the matter, EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism notes**:
>
> > **Not all types of sexual favoritism violate Title VII**. It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, **but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.**

O'Patka v. Menasha Corp., 878 F.Supp. 1202, 1206 (E.D.Wis. 1995) (emphasis added), *quoting* EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC

Notice No. 915-048 (Jan. 12, 1990);[3] see also Womack, 147 F.3d at 1300 (holding that paramour favoritism does not violate Title VII and noting that the "Equal Employment Opportunity Commission, which is charged with enforcing Title VII, has also reached the same conclusion."); Memorandum Decision, p. 19.

The federal courts, including the Ninth Circuit,[4] have repeatedly and overwhelmingly held that favoritism stemming from a consensual romantic relationship does not constitute gender discrimination or harassment under Title VII. This Court looks to federal law in interpreting the provisions of the IHRA; accordingly, favoritism towards a paramour similarly does not violate the IHRA. See Banks, 429 F.Supp.2d at 1200 n.3 and 1203; Bowles, 100 Idaho at 812, 606 P.2d at 462; Memorandum Decision, p. 17.

b. Overwhelming Case Law Regarding Paramour Favoritism Renders Plaintiff's Purported Belief that Such Conduct Violated the IHRA Unreasonable as a Matter of Law

Because the conduct at issue did not violate the IHRA, Plaintiff's alleged complaints about such conduct did not constitute a protected activity under the IHRA. Plaintiff must demonstrate that she "opposed any practice **made unlawful by [the IHRA]** or . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation **under [the IHRA]**." I.C. § 67-5911 (emphasis added). As the federal courts have held with respect to retaliation under Title VII: "The mere fact that an employee is participating in an investigation . . . does not automatically trigger the protection afforded under [Title VII]; **the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII.**" Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (emphasis added).

---

[3] EEOC Notice 915-048 can be viewed at the EEOC's website at: http://www.eeoc.gov/policy/docs/sexualfavor.html (last visited on Nov. 20, 2009.)

[4] See Candelore v. Clark County Sanitation Dist., 752 F.Supp. 956, 960 (D.Nev. 1990), *aff'd mem.* 975 F.2d 588 (9th Cir. 1992)

As this Court recognized, "[a] plaintiff may make a *prima facie* showing on the protected activity element by demonstrating she held a reasonable, good faith belief she was engaging in protected activity, even if she was in fact not." Memorandum Decision, p. 18. The key term for purposes of this Court's analysis of the current situation is "reasonable." Plaintiff "must not only show that [s]he subjectively (that is, in good faith) believed that [her] employer was engaged in unlawful employment practices, but also that [her] belief was objectively reasonable in light of the facts and record presented." Little v. United Techs., 103 F.3d 956, 960 (11th Cir. 1997). As this Court correctly held, Plaintiff's purported belief that she was engaging in a protected activity when she discussed her concerns regarding Mr. Warren's consensual romantic relationship with Ms. Stiles was not objectively reasonable as a matter of law. Memorandum Decision, pp. 18-19.

In her Motion for Reconsideration, Plaintiff asserts that "[i]ssues of reasonableness are most commonly reserved for the jury to decide and are not typically resolved appropriately at the summary judgment stage of a litigation." Plaintiff's Motion for Reconsideration, p. 3. The cases to which Plaintiff cites, however, do not involve the question of reasonableness in the context of a Title VII or IHRA retaliation claim (i.e. the reasonableness of the plaintiff's belief that he or she was engaging in a protected activity.) See id. The concept of reasonableness is not an automatic ticket to get a plaintiff's case to a jury, as Plaintiff asserts, particularly in light of the record presented here.

Contrary to Plaintiff's assertion, the federal courts, to which this Court turns for guidance in interpreting claims raised under the IHRA, have regularly decided as a matter of law the issue of reasonableness of a plaintiff's belief that he or she was engaging in protected activity under Title VII. See, e.g., Galdieri-Ambrosini v. Nt'l Realty & Dev. Corp., 136 F.3d 276, 291-92 (2d. Cir. 1998) (upholding district court's dismissal pursuant to a Motion for Judgment as a Matter of

Law); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000) (upholding judgment as a matter of law in favor of defendant); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1988) (upholding district court's dismissal pursuant to a Rule 12(b)(6) Motion to Dismiss); Ross v. City of Perry, Ga., 2009 WL 3190450 (M.D.Ga. 2009) (granting defendant's Motion for Summary Judgment); Adams v. Giant Food, Inc., 225 F.Supp.2d 600, 605-06 (D.Md. 2002) (granting defendant's Motion for Summary Judgment). Even the United States Supreme Court, in reversing the Ninth Circuit and upholding the district court's dismissal of a case pursuant to the defendant's Motion for Summary Judgment, held as a matter of law that "no reasonable person could have believed" that the conduct at issue in that case "violated Title VII's standard." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269-71 (2001). In the case at hand, the Court's determination as a matter of law that Plaintiff's purported belief was not reasonable was proper and in accordance with the federal courts that have addressed similar issues as a matter of law.

In light of the "mound of caselaw on the matter," as one district court appropriately described precedential authority on the issue of paramour favoritism, Plaintiff's belief that Mr. Warren's alleged favoritism of Ms. Stiles violated the IHRA was not reasonable. O'Patka, 878 F.Supp. at 1206. "The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999). In rejecting the argument that plaintiffs should not be "charged with substantive knowledge of the law," the Eleventh Circuit held: "If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge," noting that "it would eviscerate the objective component of our reasonableness inquiry." Harper,

139 F.3d at 1388 n.2. In this case, "Plaintiff did not have a reasonable belief that her employer had violated the law. First, **the unanimity with which the courts have declared favoritism of a paramour to be gender-neutral belies the reasonableness of Plaintiff's belief** that such favoritism created a hostile work environment." Sherk v. Adesa Atlanta, LLC, 432 F.Supp.2d 1358, 1370 (N.D.Ga. 2006) (emphasis added); see also Harper, 139 F.3d at 1388 (holding that "'it is insufficient for a plaintiff to allege his belief . . . was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.' The reasonableness of the plaintiffs' belief in this case is **belied by the unanimity with which the courts have declared . . . policies like Blockbuster's nondiscriminatory**.") (emphasis added), *quoting* Little, 103 F.3d at 960; Equal Employment Opportunity Comm'n v. Luce, Hamilton, Forward & Scripps, 303 F.3d 994, 1006 (9th Cir. 2002) ("**In the face of voluminous contrary legal precedent, Lagatree could not have reasonably believed Luce Forward was engaged in unlawful activity** . . .") (emphasis added).

As the Seventh Circuit held:

> The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief **must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII**. . . . Hamner's allegations **cannot be without legal foundation**, but must concern the type of activity that, under some circumstances, supports a charge of sexual harassment. **If a plaintiff opposed conduct that was not proscribed by Title VII, no matter how frequent or severe, then his sincere belief that he opposed an unlawful practice cannot be reasonable.** As the law stands, the harassment that he opposed did not violate Title VII.

Hamner, 224 F.3d at 707 (emphasis added) (internal quotation marks and citations omitted). Similarly, a federal district court stated:

> In conclusion, we again hold that **because Title VII does not prohibit a supervisor from giving preferential treatment to a supervisee with whom she has a relationship, Horn could not have reasonably believed that the alleged**

> **affair he reported violated Title VII**. Consequently, Horn cannot state a cause of action for retaliation under a theory of workplace favoritism.

Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc., 2006 WL 2024240, *5 (N.D.Ill. 2006) (emphasis added).

In the present case, "voluminous contrary legal precedent" has held that favoritism stemming from a consensual intra-office romance does not constitute unlawful discrimination or harassment. Luce, Hamilton, Forward & Scripps, 303 F.3d at 1006. In light of this legal precedent, Plaintiff's belief to the contrary was "without legal foundation" and therefore was not objectively reasonable. Hamner, 224 F.3d at 707.

Perhaps more important is the nature of the alleged conduct that Plaintiff purportedly opposed in this case. The record is replete with evidence demonstrating that the conduct Plaintiff opposed was Mond Warren's alleged favoritism of Lori Stiles and the SUR Unit over Plaintiff and her Fraud Unit. Both the Fraud and SUR Units consists of both male and female employees. The depositions[5] of male and female employees from both units are in the record for the very purpose of their testimony regarding the romantic affair and the issue of whether they perceived Mr. Warren as favoring one unit. The Court in its Memorandum Decision articulated the heart of this issue when it stated: "In fact, common sense dictates that any adverse action stemming from the affair and favoritism of the SUR Unit would have fallen upon male and female fraud investigators alike." Memorandum Decision, p. 19. The very nature of the conduct opposed by Plaintiff in this case is gender neutral, and no reasonable person could conclude that the alleged favoritism was based on gender or sex discrimination or harassment.

///

[5] See Depositions of Paula Hisle-Culet (Fraud Investigator); Greg Snider (SUR Unit); Susan Slade-Grossl (Fraud Unit); Lori Stiles (SUR Unit); Dwayne Sanders (Fraud Unit); Plaintiff (Fraud Unit).

2. The Facts Presented by Plaintiff Do Not Demonstrate the Existence of a Genuine Issue of Material Fact Regarding the Question of the Objective Reasonableness of Plaintiff's Purported Belief

In support of her Motion for Reconsideration, Plaintiff submitted an Affidavit setting forth several "new" facts that she alleges demonstrate a genuine issue of material fact regarding the issue of whether she believed that she was engaging in a protected activity under the IHRA when she discussed concerns about alleged favoritism stemming from Mr. Warren's and Ms. Stiles' consensual romantic relationship. However, none of the facts set forth in Plaintiff's Affidavit demonstrate the existence of a genuine issue of material fact as to the question of whether Plaintiff's belief that the alleged favoritism violated the IHRA was objectively reasonable.

a. *Workplace Training Received by Plaintiff*

Plaintiff first asserts that she attended "Respectful Workplace Training" in August 2004 and that, based upon the training materials distributed to employees, she "was left with the clear impression that Mond Warren's intra-office, romantic affair with Lori Stiles amounted to a hostile work environment." Plaintiff's Affidavit, ¶¶ 2-3. A review of the training materials referenced by Plaintiff, however, reveals that this interpretation of the materials is not objectively reasonable. Plaintiff's Affidavit, Ex. 1. The materials, in fact, clarify, consistent with federal case law, that:

> Sexual harassment at work occurs whenever unwelcome conduct **on the basis of gender** affects a person's job. It is defined by the Equal Employment Opportunity Commission (EEOC) as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."
>
> . . . The second kind of sexual harassment is called "hostile environment." A supervisor, co-worker, or someone else with whom the victim comes in contact on

> the job creates an abusive work environment or interferes with the employee's work performance through words or deeds ***because of the victim's gender***.

Plaintiff's Affidavit, Ex. 1, p. 1 (some emphasis added).

As one federal district court held, with respect to a case of alleged paramour favoritism: "Because Plaintiff has introduced no evidence that he was subjected to the alleged hostility **because of his gender** and in fact testified that Weber's comments were not directed specifically towards men or women, he could not have reasonably believed that Weber's alleged conduct violated Title VII." Drummond v. IPC Int'l, Inc., 400 F.Supp.2d 521, 534 (E.D.N.Y. 2005) (emphasis added). Similarly, another federal district court held:

> Plaintiff's exposure to the Christian-Rioux relationship **was not based on her gender**. All employees at American Baby were equally subjected to this personal relationship. . . . [E]mployees exposed to the intimate relationship of a supervisor are not discriminated against **because of their gender**, but rather they are discriminated against because their supervisor prefer[s] his paramour.
>
> **Under the totality of circumstances in this case, a reasonable juror could not find that Plaintiff had a good faith, reasonable belief that her employer had engaged in conduct creating a hostile work environment.**

Gale v. Primedia, Inc., 2001 WL 1537692, *3-4 (S.D.N.Y. 2001) (emphasis added) (internal citations and quotation marks omitted).

Plaintiff has pointed to absolutely no facts that demonstrate that she believed – whether subjectively or objectively – that the alleged favoritism at issue was **due to Plaintiff's gender**. Instead, Plaintiff has consistently acknowledged that she complained of alleged preferential treatment based upon Mr. Warren's sporadic romantic relationship with Ms. Stiles. See Amended Complaint, ¶ 14; 6/15/09 Affidavit of Brian Benjamin ("Benjamin Affidavit"), Ex. 1 (Plaintiff's Deposition), p. 30. Plaintiff even explicitly admitted this was the case in her briefing on IDHW's Motion for Summary Judgment, stating: "Plaintiff made numerous internal complaints about the affair and the preferential treatment that was occurring **as a result of the**

affair." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 9 (emphasis added). "Plaintiff has not alleged any facts that would lead a reasonable person in her position to infer that her gender, as opposed to favoritism for a paramour motivated the harassment she [allegedly] experienced." Gale, 2001 WL 1537692, *4. Therefore, "a reasonable person would not conclude that any harassment occurred **because of her gender**." Id. (emphasis added).

Plaintiff's alleged mistaken impression that the conduct at issue involved a "hostile work environment" under the IHRA was not a reasonable conclusion, as there is no factual dispute that Plaintiff's concerns stemmed from conduct that was not due to her gender. This is particularly so in light of the voluminous case law on the issue, as discussed above, which clearly holds more authoritative weight than any materials dispensed at an employee training. As noted above, the materials to which Plaintiff points do not lead to the reasonable conclusion that the alleged conduct at issue could violate Title VII. Regardless, however, the federal courts have clarified that an employer's sexual harassment policy or materials that are more restrictive than Title VII do not lead to a reasonable belief on the part of an employee that the conduct violates Title VII:

> Plaintiff argues that she had an objectively reasonable belief that Mr. Rush's conduct violated the law because "Defendant's own ethics handbook makes the causal connection between sexual relationships . . . and the resultant sexual harassment" . . . Both these arguments fail, however, because **Plaintiff is charged with knowledge of the substantive law**. Armed with clear holdings from the Eleventh Circuit as well as numerous other courts that favoritism is gender-neutral, **a reasonable person would not conclude that her supervisor's favoritism for his paramour violated Title VII because her employer had adopted a more restrictive policy** in its ethics handbook . . ..
>
> . . . Plaintiff has not alleged any facts that would lead a reasonable person in her position to infer that her gender, as opposed to favoritism for a paramour, motivated the harassment she experienced. . . . [A] reasonable person would not conclude that any harassment occurred because of her gender.

Sherk, 432 F.Supp.2d at 1372 (emphasis added) (citations omitted).

b. *Plaintiff's Discussions with Representatives of Human Resources*

Plaintiff next alleges that she "had discussions with representatives of Defendant's Human Resources Division which reasonably led her to believe that the affair and the preferential treatment violated the law." Plaintiff's Motion for Reconsideration, p. 5. Specifically, Plaintiff alleges that when Heidi Graham (formerly Heidi Gordon) met with Plaintiff in December 2004 during the investigation into alleged favoritism, Ms. Graham purportedly told Plaintiff that she "was looking into potential violations of Title VII of the Civil Rights Act of 1964." Plaintiff's Affidavit, ¶ 4. Plaintiff further alleges that Monica Young told Plaintiff in January 2005 that Plaintiff could contact the Idaho Division of Human Resources ("DHR") if she was "not happy with the findings" of the investigation, while, according to Plaintiff, "Ms. Graham also stated that contacting the IDHR was another option for me" in April 2005. Id. at ¶¶ 5-6. Plaintiff describes her resulting leap of logic: "My understanding from this . . . was that the affair and the preferential treatment were clearly human resources issues that were within the legal area of sexual harassment." Id. at ¶ 6. Finally, Plaintiff alleges that between March 2005 and August 2005, she had discussions with Bethany Zimmerman during which Ms. Zimmerman "mentioned hostile work environment was clearly a violation of the law." Id. at ¶ 8.

Even if the above factual allegations were true, they do not demonstrate any genuine issue as to the question of the reasonableness of Plaintiff's belief that the conduct at issue violated the IHRA. The mere fact that Ms. Graham may have made the general statement that she "was **looking into potential** violations of Title VII" during her investigation does not mean that any actual violation was discovered through the investigation - or that all conduct reviewed as part of the investigation even involved **potential** violations. Similarly, Ms. Zimmerman's alleged, general statement that "hostile work environment was clearly a violation of the law" would not

reasonably lead to the conclusion that the **particular alleged conduct at issue** actually constituted a "hostile work environment" under Title VII or the IHRA.

Regardless, Plaintiff cannot base her claim that she held a reasonable belief that the conduct violated the IHRA upon a third party's stated belief. As one federal district court articulated:

> Plaintiff argues that he can establish that he had a good faith, reasonable belief that the t-shirt incident was an unlawful employment practice because at the time he delivered the grievance, he believed *Ms. Kitchens* found the t-shirt incident to be an unlawful employment practice, to wit, sexual harassment. Essentially, Plaintiff argues that he can establish a statutorily protected expression **based on his good faith belief that a third party believed the employment practice to be unlawful. Plaintiff, however, provides no legal authority for such a proposition, and the Court could find no such authority on its own initiative. . . . The Court can find no legal authority to support Plaintiff's claim that he can establish a prima facie case of retaliation under the opposition clause if he shows that he had a good faith belief in *another's* good faith belief that their employer was engaged in unlawful employment practices.**

Ross v. City of Perry, Ga., 2009 WL 3190450 at *13 (emphasis added). In other words, even if Ms. Graham or Ms. Zimmerman had explicitly stated that they believed the alleged conduct unequivocally involved a Title VII violation (which is far more specific than what Plaintiff alleges Ms. Graham and Ms. Zimmerman actually stated), Plaintiff cannot establish a *prima facie* case of retaliation merely by "show[ing] that [s]he had a good faith belief in *another's* good faith belief that their employer was engaged in unlawful employment practices." Id.

Even more of a stretch is Plaintiff's assertion that Ms. Young's and Ms. Graham's statements that she could contact the Division of Human Resources about the findings of the investigation led to her "understanding . . . that the affair and the preferential treatment were clearly human resources issues that were within the legal area of sexual harassment." Plaintiff's Affidavit, ¶ 6. Not all "human resources issues" involve "issues that [are] within the legal area of sexual harassment." Id. Indeed, DHR is a state agency that deals with a multitude of human

resources issues, including employee compensation and benefits, hiring practices, oversight of the Idaho Personnel Commission (which hears appeals by classified State employees unrelated to alleged discrimination or harassment), employee performance evaluations, and consultation regarding general employee relations issues, to name a few.[6] Notably, Plaintiff does not allege that she actually contacted DHR or that she had a real understanding of DHR's general role. See Plaintiff's Affidavit, ¶¶ 5-6. Instead, she concluded, without a reasonable basis, that all matters involving DHR must somehow involve "issues . . . within the legal area of sexual harassment." Id. at ¶ 6. A mere referral to DHR, which deals with multiple employee issues unrelated to harassment or discrimination, does not support Plaintiff's alleged belief that the conduct at issue violated the IHRA.

c. *Plaintiff's Legal Research*

Finally, Plaintiff alleges that she "performed her own legal research into whether the affair and preferential treatment violated the law, and she was left with that specific impression after reading certain legal precedents on her own." Plaintiff's Motion for Reconsideration, p. 6. Specifically, Plaintiff alleges that she "started researching on [her] own the court cases regarding sexual harassment and hostile work environment" on April 5, 2005. Plaintiff's Affidavit, ¶ 7. "On December 20, 2006, [she] came across the California Supreme Court case of Miller v. Department of Corrections," the only legal precedent Plaintiff appears to have discovered in purported support of her position. Id. at ¶ 9. Plaintiff does not allege that she found legal precedent in support of her position prior to December 20, 2006, despite having conducted research on the subject for nearly two years. Id. at ¶¶ 7, 9. This is not particularly surprising, given the voluminous case law contrary to her position, which common sense dictates she must have encountered during her lengthy research. See pp. 6-12, above.

---

[6] See DHR's website at: http://www.dhr.idaho.gov/ (last visited Nov. 20, 2009).

The timing of Plaintiff's discovery of the Miller case on December 20, 2006 is significant. Plaintiff participated in the Human Resources investigation into Mr. Warren's and Ms. Stiles' relationship in December 2004. Plaintiff's Affidavit, ¶ 4; Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment ("Defendant's Statement of Facts"), ¶ 6. Plaintiff discussed her concerns regarding the relationship with Heidi Graham in the spring of 2005 and asserts that she also discussed the relationship with Bethany Zimmerman "[b]etween March 2005 and August 2005." Plaintiff's Affidavit, ¶¶ 6, 8; Defendant's Statement of Facts, ¶ 13. Finally, in September 2006, Plaintiff expressed her concerns regarding the relationship to the new Director of IDHW, Richard Armstrong. Defendant's Statement of Facts, ¶ 14. Notably, all of these conversations took place prior to December 20, 2006. Plaintiff therefore had not yet reviewed the Miller case at the time she claims to have held a "reasonable" belief that she was engaging in a protected activity by expressing her concerns.

"The plaintiff must . . . at a minimum have held a reasonable good faith belief **at the time [s]he opposed an employment practice** that the practice was violative of Title VII." Adams, 225 F.Supp.2d at 606 (emphasis added). Plaintiff, however, alleges:

> **On December 20, 2006**, I came across the California Supreme Court case of Miller v. Department of Corrections. **After** reading this case, I was convinced that I had a strong case for sexual harassment and hostile work environment as a result of the intra-office, romantic affair that was occurring between Mond Warren and Lori Stiles. **To this point in time**, I knew it was not right for Defendant to allow Mond Warren to continue to supervise both Lori Stiles and me, with the affair ongoing and preferential treatment being afforded Lori Stiles and the SUR Unit she supervised. However, **once I read the Miller case**, it was my impression and belief that the affair and preferential treatment were illegal, were violations of Title VII and the Idaho Human Rights Act, and were resulting in illegal retaliation against me.

Plaintiff's Affidavit, ¶ 9 (emphasis added). In other words, Plaintiff herself acknowledges that while she only subjectively believed that the consensual relationship between Mr. Warren and

Ms. Stiles "was not right" at the time she expressed her concerns, it was not until **after** finding the Miller case – and thus **after** she had already engaged in the alleged "protected activity" – that she developed her belief that the conduct was illegal. Id. This does not demonstrate an objectively reasonable belief that the conduct was unlawful "at the time [s]he opposed [the] employment practice." Adams, 225 F.Supp.2d at 606.

Regardless, the Miller case does not support a reasonable belief that the alleged conduct in this case involved a violation of the IHRA. First, Miller is markedly distinguishable from the case at hand. Miller involved "widespread sexual favoritism," rather than a single, isolated workplace relationship. Miller v. Cal. Dep't of Corr., 115 P.3d 77, 94 (Cal. 2005). In the Miller case, the warden of the facility where the plaintiffs worked, Mr. Kuykendall, was having sexual affairs with **three** subordinates – Ms. Brown, Ms. Bibb, and Ms. Patrick – whom Mr. Kuykendall blatantly promoted, and "there were widespread rumors that sexual affairs between subordinates and their superior officers were 'common practice in the Department of Corrections' and that there were rumors that employees . . . secured promotion this way." Id. at 81-82. Employees witnessed Mr. Kuykendall fondling Ms. Bibb on several occasions, and a different employee complained that he "had put his arms around her and another employee and made unwelcome groping gestures." Id. at 83. The women with whom Mr. Kuykendall was having affairs also "squabbled over him, sometimes in emotional scenes witnessed by other employees." Id. In addition, one of the plaintiffs, Ms. Miller, found that her access to the warden was blocked when she refused the apparent romantic advances of the female chief deputy warden, Ms. Yamamoto, who was additionally rumored to be engaged in a romantic relationship with Ms. Brown, one of the female subordinates with whom the warden was also involved. Id. Ms. Brown, in fact, "physically assaulted Miller, holding her captive for two hours" after Ms. Miller "threatened to

make a public announcement concerning the affair between Brown and Kuykendall." Id. Mr. Kuykendall, in turn, complained to Plaintiff Miller of Ms. Brown's "untrustworthiness" and hinted to Ms. Miller that he should have instead pursued a romantic relationship with her. Id at 84.

In light of the maelstrom of various intra-office relationships occurring between supervisors and subordinates, the court remanded the case to the district court to determine whether plaintiffs could establish a claim under the California Fair Employment and Housing Act, noting:

> **[P]laintiffs in the present case alleged far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner.** They proffered evidence demonstrating the effect of widespread favoritism on the work environment, namely the creation of an atmosphere **that was demeaning to women**.
>
> . . . There was evidence of considerable flaunting of the relationships affecting the workplace, consisting of Bibb's and Brown's bragging and the jealous scenes between these two women, along with Kuykendall's indiscreet behavior at a number of work-related social gatherings. The favoritism that ensued from the sexual affairs also was on public display, reflected in Kuykendall's permitting Brown to abuse plaintiffs, his directive to the interview committee to promote Bibb, and his repeated admissions that he would not or could not control Brown because of his sexual relationship with her. It may even be inferred that Kuykendall solicited sexual favors in return for employment benefits, in light of Bibb's and Brown's boasts, the sequence of promotions awarded by Kuykendall, and his comment to Miller, "I should have chose[n] you."
>
> . . . Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and Kuykendall's admission he could not control Brown because of his sexual relationship with her . . ..

Id. at 93-94, 97 (emphasis added).

In contrast, the present case involves a single, consensual romantic relationship. As one court explained in a similar situation:

> The court disagrees that plaintiff has alleged the "widespread favoritism" necessary to rise to the level of an actionable hostile work environment claim. Among other reasons, during her employment with defendant, plaintiff witnessed favoritism by a single supervisor toward a single employee. **In order for widespread favoritism to constitute a hostile work environment, courts require plaintiffs to show that multiple supervisors engaged in the challenged conduct.** McGinnis v. Union Pacific Railroad, 496 F.3d 868, 874 (8th Cir. 2007) ("**A single allegation against [a supervisor] cannot constitute widespread sexual favoritism.**"); Bartniak v. Cushman & Wakefield, Inc., 223 F.Supp.2d 524, 532 (S.D.N.Y. 2002) ("**Widespread favoritism refers to an environment where multiple supervisors are engaging in the behavior** . . .")

Ahern v. Omnicare ESC LLC, 2009 WL 2591230, *7 (E.D.N.Y. 2009) (emphasis added). Unlike Miller, this case involves exactly the type of isolated alleged favoritism that the federal courts have repeatedly held does **not** constitute a violation of Title VII and that the Miller court itself recognized as distinguishable from the "widespread sexual favoritism" at issue in Miller: the simple allegation "that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner." Miller, 115 P.3d at 93; see also Proksel v. Gattis, 49 Cal.Rptr.2d 322, 324 (Cal. Ct. App. 1996) (other case law from California recognizing that "[w]here . . . there is no conduct other than favoritism toward a paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists" and holding: "[W]e agree with the weight of authority that it would be both impracticable and unwarranted for the courts to assume a generalized police power over intimate consensual relationships between co-employees.")

What is noticeably different in the Miller case, as opposed to the case at hand, is the fact that not only was the favoritism widespread, it was pervasive and severe **on the basis of gender**. As discussed above, the alleged favoritism of Ms. Stiles and the SUR Unit in this case equally

affected both men and women in the Fraud Unit, and there was no connection to gender or sex discrimination or any other violation of the IHRA.

In sum, the fact that Plaintiff engaged in legal research on the issue between at least April 2005 and December 2006 indicates that she should have been aware of the extensive case law that would dispel any reasonable belief that isolated favoritism toward a paramour violated the IHRA. Regardless, Plaintiff is charged with substantive knowledge of the law with respect to the issue of whether her belief was objectively reasonable. The sole case Plaintiff discovered in attempted support of her alleged belief does not, in fact, support a reasonable conclusion that Mr. Warren's relationship with Ms. Stiles violated the IHRA. Instead, the Miller case is easily distinguishable from the case at hand, as even the Miller court itself recognized.[7] In the face of the overwhelming weight of authority contrary to Plaintiff's position, Plaintiff's purported belief that the alleged conduct at issue in this case violated the IHRA was not objectively reasonable.

IV.

CONCLUSION

This Court correctly held, in its Memorandum Decision, that Plaintiff did not engage in a protected activity under the IHRA. The federal courts have held that favoritism by a supervisor toward a paramour does not constitute sexual discrimination under Title VII, because it is not based upon gender. In light of the voluminous legal authority on the issue, Plaintiff's purported belief to the contrary was not objectively reasonable, and thus Plaintiff cannot demonstrate that she held the requisite good faith, reasonable belief that the alleged conduct in this case violated the IHRA.

---

[7] Furthermore, the Idaho courts have held that the courts may look to **federal** case law and **Title VII** in interpreting the provisions of the IHRA. The Miller case is not a federal case, but is instead a California Supreme Court case, examining the California Fair Employment and Housing Act.

Plaintiff has pointed to no genuine issue of material fact regarding the question of the objective reasonableness of her belief. Even if all the facts upon which Plaintiff relies are accepted as true, Plaintiff's belief was not objectively reasonable, as a matter of law. Significantly, Plaintiff does not dispute that the concerns she expressed stemmed from her perception that Mr. Warren was displaying favoritism toward Ms. Stiles and the SUR Unit **because of their consensual romantic relationship**. Specifically, Plaintiff has alleged that she complained about "[t]he preferential treatment of Lori [Stiles] by Mond [Warren] and the fact that there was a relationship going on **and that was the basis for preferential treatment** and inability for other people to go to Mond with any concerns or problems with Lori." Benjamin Affidavit., Ex. 1, p. 30 (Plaintiff's Deposition) (emphasis added). Plaintiff points to no facts that would support the conclusion that she raised complaints or expressed concerns **based upon her gender**. Plaintiff's alleged mistaken impression that favoritism based upon a consensual romantic relationship violated Title VII and the IHRA was simply not reasonable as a matter of law. "If a plaintiff opposed conduct that was not proscribed by Title VII, no matter how frequent or how severe, then h[er] sincere belief that [s]he opposed an unlawful practice cannot be reasonable." Hamner, 224 F.3d at 707.

///

///

///

///

///

///

///

For the reasons set forth above, as well as the arguments expressed in Defendant IDHW's prior briefing on its Motion for Summary Judgment, IDHW respectfully requests that this Court affirm its Memorandum Decision, which correctly granted IDHW's Motion for Summary Judgment.

DATED this 23rd day of November, 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
BRIAN B. BENJAMIN
KARIN D. JONES
Deputy Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2009, I forwarded a true and correct copy of the foregoing DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S IHRA CLAIM by the following method to:

Jason R. N. Monteleone, Esq.
JOHNSON & MONTELEONE, LLP
405 S. 8th St., Ste. 250
Boise, ID 83702

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Certified Mail, Return Receipt Requested
- [ ] Electronic Mail
- [ ] Facsimile: (208) 947-2424

_____
BRIAN B. BENJAMIN
KARIN D. JONES
Deputy Attorneys General

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff, vs. STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I THROUGH X, whose true identities are presently unknown, Defendant.	Case No. CVOC0717095 MEMORANDUM DECISION RE: PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT

APPEARANCES

For Plaintiff: Jason R. N. Monteleone of Johnson & Monteleone, L.L.P.

For Defendants: Brian Benjamin, Deputy Attorney General, Office of the Attorney General

PROCEEDINGS

This matter came before the Court on the Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim. After hearing argument, the Court took the matter under advisement. For the reasons discussed below, the Court denies the Plaintiff's Motion.

LEGAL STANDARD

A motion for reconsideration of an order granting summary judgment can be

made prior to entry of final judgment. I.R.C.P. 11(a)(2)(B); *Puckett v. Verska*, 144 Idaho 161, 166, 158 P.3d 937, 942 (2007). A party may submit new evidence with the motion for reconsideration but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006). A decision to grant or deny a motion for reconsideration is within the sound discretion of the trial court. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, __, 212 P.3d 982, 990 (2009).

Summary judgment will be granted only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Ass'n. v. Bear Lake County,* 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or "if reasonable people might reach different conclusions." *Parker v. Kokot,* 117 Idaho 963, 966, 793 P.2d 195, 199 (1990).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). If the moving party meets that burden, the party who resists summary judgment has the responsibility to place in the record before the court the existence of controverted material facts that require resolution at trial. *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 508, 768 P.2d 768, 771 (1988). The resisting party may not rely on his pleadings nor merely assert the existence of facts

which might support his legal theory. *Id.* He must establish the existence of those facts by deposition, affidavit, or otherwise. *Id.*; I.R.C.P. 56(e). A mere scintilla of evidence or a slight doubt as to the facts is not sufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). In other words, there must be evidence on which a jury might rely. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Pounds v. Denison*, 120 Idaho 425, 426, 816 P.2d 982, 983 (1991).

DISCUSSION

The Plaintiff asks the Court to reconsider its Order Granting Summary Judgment in favor of the Defendant on the Plaintiff's retaliation claim under the Idaho Human Rights Act (IHRA). The Plaintiff contends there are genuine issues of material fact regarding whether she engaged in a "protected activity" under the IHRA, or at least had a reasonable, good faith belief she was engaging in protected activity, when she voiced opposition to Mr. Warren's and Ms. Stiles' affair and Mr. Warren's alleged acts of favoritism towards Ms. Stiles and the SUR Unit at the Idaho Department of Health and Welfare (IDHW). In support of this argument, the Plaintiff submits new evidence via affidavit.[1]

First, the Plaintiff points to a "Respectful Workplace Training" she attended in

[1] The factual background of this case is found in the Court's Memorandum Decision of September 23, 2009 and will not be repeated here.

August of 2004. At this training, the Plaintiff received a handout, which included the following excerpts:

> Sexual harassment at work occurs whenever unwelcome conduct *on the basis of gender* affects a person's job. It is defined by the Equal Employment Opportunity Commission as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individuals work performance or creating an intimidating, hostile, or offensive working environment.
> . . . The second kind of sexual harassment is called "hostile environment." A supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee's work performance through words or deeds *because of the victim's gender.* A sexually hostile work environment can be created by: *. . . granting job favors to those who participate in consensual sexual activity . . . .*"

Plaintiff's Affidavit, Ex. 1, p. 1 (some emphasis added). Based on these training materials, the Plaintiff was "left with the clear impression that Mond Warren's intra-office, romantic affair with Lori Stiles amounted to a hostile work environment."

Second, the Plaintiff points to conversations with persons in the Human Resources department that led her to believe the affair and alleged favoritism violated the law. For example, Ms. Graham purportedly told Plaintiff that she "was looking into potential violations of Title VII of the Civil Rights Act of 1964." Additionally, Ms. Zimmerman said a "hostile work environment was clearly a violation of the law." The Plaintiff states via affidavit that her "understanding from this . . . was that the affair and the preferential treatment were clearly human resources issues that were within the legal area of sexual harassment."

Third, the Plaintiff submits she conducted legal research into whether the affair and preferential treatment violated the law and discovered *Miller v. State Department of Corrections* on December 20, 2006. The Plaintiff felt after reading *Miller* that she had "a

strong case of sexual harassment and hostile work environment as a result of the intra-office, romantic affair that was occurring between Mond Warren and Lori Stiles." Additionally, the Plaintiff had an "impression and belief that the affair and preferential treatment were illegal, were violations of Title VII and the Idaho Human Rights Act . . . ."

Resting on this new evidence and the record before the Court on the Defendant's Motion for Summary Judgment, the Plaintiff asks the Court to reconsider its decision. For the following reasons, the Court declines to do so.

The IHRA makes it unlawful for an employer "because of, or on a basis of, race, color, religion, sex or national origin . . . to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment or to reduce the wage of any employee in order to comply with this chapter." I.C. § 67-5909. The statute also prohibits retaliation against an individual for having "opposed any practice made unlawful by this chapter or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." I.C. § 67-5911.

The clear purpose of the IHRA is to "provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964 . . . ." I.C. § 67-5901(1); *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 925, 908 P.2d 1228, 1232 (1995). For that reason, Idaho courts consider federal law for guidance in interpreting the IHRA. *Foster*, 127 Idaho at 925, 908 P.2d at 1232 (citing *O'Dell v. Basabe*, 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991)); *Bowles v. Keating*, 100 Idaho 808, 811, 606 P.2d 458, 461 (1979) (noting the IHRA is a "parallel state statute to Title VII of the Civil Rights Act of 1964."). Under Title VII, a plaintiff states a prima facie case of retaliation by showing

"(1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two." *Surrell v. Californian Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008) (citing *Bergene v. Salt River Project Agr. Improvement and Power Dist.*, 272 F.3d 1136, 1140-41 (9th Cir. 2001)); *see also Banks v. Pocatello Sch. Dist No. 25*, 429 F. Supp. 2d 1197, 1205 (D. Idaho 2006). The Court adopts this federal framework in analyzing the Plaintiff's retaliation claim under I.C. § 67-5911, the retaliation provision of the IHRA.

The element at issue in the prior Motion for Summary Judgment and in this Motion for Reconsideration is the first: whether the Plaintiff engaged in a protected activity. Federal courts recognize that a plaintiff can make a prima facie showing on the protected activity element by demonstrating she had a reasonable, good faith belief she was opposing unlawful employment practices, even if ultimately the practices are not in fact unlawful. *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); *Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997). The Plaintiff's burden is to show she "*subjectively* (that is, in good faith) believed that [her] employer was engaged in unlawful employment practices, but also that [her] belief was *objectively* reasonable in light of the facts and record presented." *Little*, 103 F.3d at 960.

The Court fully credits the Plaintiff's assertion throughout this litigation that she believed in good faith the conduct she opposed was unlawful. The Plaintiff has consistently characterized this conduct as the affair between Mr. Warren and Ms. Stiles and Mr. Warren's alleged favoritism of Ms. Stiles and the SUR Unit. The Plaintiff believed this conduct amounted to sexual harassment, particularly a hostile work environment, and gender discrimination, in violation of Title VII and the IHRA. The

question is whether her belief is objectively reasonable. Considering the record in a light most favorable to the Plaintiff, the Court finds it was not.

First, the overwhelming majority of courts, including courts in the Ninth Circuit that have addressed this issue, have held that favoritism of a paramour does not violate Title VII. *See, e.g., Tenge v. Philips Modern Agric. Co.*, 446 F.3d 903, 909 (8th Cir. 2006); *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005); *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003); *Schobert v. Illinois Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Womack v. Runyon*, 147 F.3d 1298, 1300-01 (11th Cir. 1998); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145, 149-50 (4th Cir. 1996); *Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956, 960-61 (D. Nev. 1990); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1985). The Plaintiff voiced concerns about activity that, if proven, would not state a violation of Title VII.

The Plaintiff concedes the above, but implicitly argues it is not relevant to whether the Plaintiff reasonably believed paramour favoritism was a violation of Title VII and the IHRA. However, whether the actual conduct complained of would violate Title VII is relevant to the Court's inquiry, although an actual violation of Title VII need not be proven. *See Trent*, 41 F.3d at 526. The Ninth Circuit has considered the substantive state of the law to be relevant to the reasonableness of a plaintiff's belief. *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1005-06 (9th Cir. 2002) (holding that "[i]n the face of voluminous contrary legal precedent" the employee could not have been reasonable in his belief the defendant was engaged in unlawful activity). This comports with the approach of other federal courts. *See, e.g., Clover v. Total Sys.*

Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999) ("The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law."); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (noting the plaintiff's belief "must be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII.").

Even if the Court does not charge the Plaintiff with knowledge of the state of the law regarding paramour favoritism under Title VII, there is little in the record that would support the reasonableness of the Plaintiff's belief that the conduct violated Title VII or the IHRA. Title VII and the IHRA are not general workplace grievance statutes. Rather, they prohibit specific types of discrimination, including discrimination based on a person's sex or gender. Nothing in the record suggests the Plaintiff voiced concerns about sex or gender discrimination. The Plaintiff consistently opposed alleged acts of favoritism arising out a consensual affair between her supervisor, Mr. Warren, and a lateral co-worker, Ms. Stiles. The Plaintiff makes three main arguments in support of the reasonableness of her belief this conduct violated Title VII and the IHRA.

First, the Plaintiff argues the Defendant's Workplace Training materials led her to believe that the conduct at issue violated Title VII and the IHRA. This argument is not supported by the materials themselves. The materials state in relevant part:

> Sexual harassment at work occurs whenever unwelcome conduct *on the basis of gender* affects a person's job. It is defined by the Equal Employment Opportunity Commission as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individuals work performance or creating an intimidating, hostile, or offensive working environment.
> . . . The second kind of sexual harassment is called "hostile environment."

> A supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee's work performance through words or deeds *because of the victim's gender.* A sexually hostile work environment can be created by: . . . *granting job favors to those who participate in consensual sexual activity* . . . ."

Plaintiff's Affidavit, Ex. 1, p. 1 (some emphasis added). Even applying this standard, the Plaintiff has not alleged any facts demonstrating the favoritism at issue was due to Plaintiff's, or any other person's, sex or gender. Neither does the record, analyzed in a light most favorable to the Plaintiff, support a conclusion that the affair created an abusive or hostile work environment. If the Plaintiff concluded after reading these materials that an isolated instance of paramour favoritism fell into either category of sexual harassment as described in the training materials, that conclusion was not objectively reasonable. In any event, federal courts have found that employer training materials that are more restrictive than Title VII do not create a reasonable belief on the part of the employee that conduct violates Title VII. *See Sherk v. Adesa Atlanta, LLC*, 432 F.Supp.2d 1358, 1372 (N.D. Ga. 2006).

Second, the Plaintiff argues her alleged discussions with IDHW Human Resources representatives support the reasonableness of her belief that the conduct at issue violated the Title VII and the IHRA. Ms. Graham said she was "looking into potential violations of Title VII" and Ms. Zimmerman said a "hostile work environment was clearly a violation of the law." Assuming these statements were made, they do not support the reasonableness of the Plaintiff's belief. Even if the statements were actually specific to the conduct at issue, the Plaintiff cannot establish a prima facie case of retaliation by showing that she had a "good faith belief in *another's* good faith belief that their employer was engaged in unlawful employment practices." *Ross v. City of*

Perry, No. 5:07-CV-433 (CAR), 2009 WL 3190450, at *13 (M.D. Ga. Sept. 30, 2009).

Third, the Plaintiff argues her legal research and her discovery of the *Miller* case supports the reasonableness of her belief that Mr. Warren's conduct violated Title VII and the IHRA. However, the timing of her legal research—December of 2006, making it after she was allegedly engaging in protected activity—renders it irrelevant to the Court's inquiry, which is directed to whether the Plaintiff had a reasonable, good faith belief she was engaging in protected activity at the time she opposed the employment practice.

Even setting aside this problem of chronology, the *Miller* case is wholly distinguishable from the activity at the center of the Plaintiff's case. *See Miller v. Dep't of Corr.*, 115 P.3d 77, 91-92 (Cal. 2005). *Miller* entailed widespread behavior that arguably created an "atmosphere demeaning to women." *Id.* at 92. The *Miller* case is an extreme example of a workplace environment where widespread affairs and favoritism created an environment where women could feel they were merely "sexual playthings" and that the only way to move up the ladder was by engaging in sexual conduct with the boss. *Id.* The *Miller* court approvingly quoted (and then distinguished) the EEOC policy guidelines:

> [a]n isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. [Fn. omitted.] A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman.

Id. at 89 (quoting EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990)).

Here, the Plaintiff faced one isolated affair and some acts of favoritism. *Miller* itself stated that such isolated instances do not rise to the level of "widespread sexual favoritism," a position consistent with EEOC policy guidelines. *Id.* at 93. What allegedly occurred at IDHW was precisely the type of isolated affair and isolated incidents of favoritism that the *Miller* court itself (along with the EEOC policy guidelines and the great majority of federal courts) stated did not violate Title VII. Judging the record in a light most favorable to the Plaintiff, there is evidence Mr. Warren had an affair with the Plaintiff's lateral co-worker and may have engaged in various acts of favoritism. There is no evidence of widespread sexual favoritism or of an atmosphere demeaning to women. Therefore, the Plaintiff's reading of *Miller* does not support the reasonableness of her beliefs regarding the legality of the affair and the alleged acts of favoritism.

In conclusion, the Court's review of the record, including the new affidavit submitted with the present Motion, shows that the Plaintiff never drew a line between Mr. Warren's conduct and discrimination against her or anyone else based on, or related in any way, to a person's sex or gender. The reason why the majority of courts have found that favoritism of a paramour is not sex or gender discrimination under Title VII is because both males and females are equally adversely affected. Nothing in the record suggests otherwise or takes this case outside of the ordinary paramour favoritism case. There is no doubt the Plaintiff subjectively believed Mr. Warren's conduct was wrong, violated IDHW policy, and violated the law. But, analyzing the record in a light most favorable to the non-moving party, the Court cannot find her subjective belief was objectively reasonable. Therefore, there are no genuine issues of material fact on the first element of the Plaintiff's IHRA claim. "From a practical

standpoint, there is every reason for an employer to discourage this kind of intra-office romance, as it is often bad for morale, but that is different from saying it violates Title VII." *Schobert*, 304 F.3d at 733.

CONCLUSION

The Court DENIES the Plaintiff's Motion for Reconsideration of the Order Granting Summary on the Plaintiff's IHRA claim.

DATED this 7 day of January 2010.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of January 2010, I mailed (served) a true and correct copy of the within instrument to:

Jason R.N. Monteleone
JOHNSON & MONTELEONE LLP
405 S 8th St, Ste 250
Boise, ID 83702

Brian B. Benjamin
IDAHO ATTORNEY GENERAL'S OFFICE
954 W Jefferson, 2nd Flr
PO Box 83720
Boise, ID 83720-0010

J. DAVID NAVARRO
Clerk of the District Court

By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff, v. STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I THROUGH X, whose true identities are presently unknown, Defendants.	Case No. CV OC 07 17095 FINAL JUDGMENT

APPEARANCES

For Plaintiff: Jason R. N. Monteleone of Johnson & Monteleone, L.L.P.

For Defendants: Brian Benjamin, Deputy Attorney General, Office of Attorney General

In accordance with the Court's Memorandum Decision on Defendants' Motion for Summary Judgment and Memorandum Decision Re: Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment,

JUDGEMENT IS HEREBY ORDERED in favor of Defendant, State of Idaho, Department of Health and Welfare as a matter of law.

Costs awarded to Defendant in the amount of $2,033.10 (Two Thousand Thirty-Three Dollars and 10/100's).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the preceding judgment, I hereby **CERTIFY**, in accordance with Idaho Rule of Civil Procedure 54(b) that the Court has decided all claims and defenses presented by these consolidated cases and has

determined that there is no just reason for delay of the entry of a **FINAL JUDGMENT** and the Court has and does hereby direct that the preceding judgment shall be a **FINAL JUDGMENT** upon which execution may issue and an appeal my be taken as provided by the Idaho Appellate Rules.

Dated this 16 day of February, 2010.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of Feb, 2010, I mailed (served) a true and correct copy of the within instrument to:

Jason R. N. Monteleone, Esq.
JOHNSON & MONTELEONE, LLP
405 S. 8th St., Ste. 250
Boise, ID 83702

Brian B. Benjamin, DAG
Office of Attorney General
P. O. Box 83720
Boise, ID 83720-0010

J. DAVID NAVARRO
Clerk of the District Court

By: _____
Deputy Clerk

Jason R.N. Monteleone (ISB No. 5441)
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, Idaho 83702
Telephone: (208) 331-2100
Facsimile: (208) 947-2424
jason@treasurevalleylawyers.com

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ORIGINAL

Lynette Patterson,

Plaintiff/Appellant

v.

State of Idaho Department of Health and Welfare and John/Jane Does I through X, whose true identities are presently unknown,

Defendants/Respondents

Case No. CV OC 07 17095

NOTICE OF APPEAL

TO: THE ABOVE-NAMED DEFENDANT/RESPONDENT, STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE, THAT PARTY'S ATTORNEY, IDAHO ATTORNEY GENERAL AND DEPUTY ATTORNEY GENERAL BRIAN BENJAMIN, AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiff/Appellant, Lynette Patterson, appeals against the above-named Defendant/Respondent, State of Idaho Department of Health and Welfare, to the Idaho Supreme Court from the orders and rulings made by the Honorable Michael R. McLaughlin in granting Defendant's/Respondent's motion for summary judgment and denying

Plaintiff's/Appellant's motion for reconsideration relative to the summary judgment rulings and orders.

2. The above-named Plaintiff/Appellant has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders, under and pursuant to I.A.R. 11(a)(1).

3. PRELIMINARY STATEMENT OF ISSUES ON APPEAL:

   (a) Whether the District Court erred in granting summary judgment to Defendant/Respondent on Plaintiff's/Appellant's claim under the Idaho Human Rights Act, I.C. §67-5901, *et seq.*; and

   (b) Whether the District Court erred in granting summary judgment to Defendant/Respondent on Plaintiff's/Appellant's claim under the Idaho Protection of Public Employees Act, I.C. §6-2301, *et seq.*

4. No order has been entered which has sealed any portion of the record in these proceedings.

5. (a) Is a reporter's transcript requested? No.

   (b) Appellants request the preparation of the following portions of the reporter's transcript: N/A.

6. Appellants request the following documents to be included in the clerk's record in addition to those automatically included under I.A.R. 28: None.

7. I certify:

   (a) That a copy of this *Notice of Appeal* has not been served on the court reporter, as no reporter's transcript is requested or been ordered;

(b) That the clerk of the district court has not been paid an estimated fee for preparation of the court reporter's transcript, as no reporter's transcript is requested or been ordered;

(c) That the estimated fee for preparation of the clerk's record has been paid in the amount of $30.00;

(d) That the appellate filing fee has been paid; and

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 20 and I.C. §67-1401(1).

DATED: This 16th day of February, 2010.

JOHNSON & MONTELEONE, L.L.P.

Jason R. N. Monteleone

Jason R. N. Monteleone
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on the 16th day of February, 2010, I caused a true and correct copy of the foregoing document to be:

☒ mailed ☐ hand delivered ☒ transmitted fax machine to: (208) 854-8073	Brian B. Benjamin Deputy Attorney General Civil Litigation Division 450 W. State Street P. O. Box 83720 Boise, ID 83720-0010

JOHNSON & MONTELEONE, L.L.P.

Jason R.N. Monteleone

Jason R.N. Monteleone
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff-Appellant, vs. STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I through X, whose true identities are presently unknow, Defendants-Respondents.	Supreme Court Case No. 37416 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 6th day of April, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICTOF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff-Appellant, vs. STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I through X, whose true identities are presently unknow, Defendants-Respondents.	Supreme Court Case No. 37416 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

JASON R.N. MONTELEONE

ATTORNEY FOR APPELLANT

BOISE, IDAHO

BRIAN B. BENJAMIN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: APR 0 6 2010

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff-Appellant, vs. STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I through X, whose true identities are presently unknow, Defendants-Respondents.	Supreme Court Case No. 37416 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 16th day of February, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

BRIAN B. BENJAMIN, ISB # 5422
KARIN D. JONES, ISB #6846
Deputy Attorneys General
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
brian.benjamin@ag.idaho.gov
Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

THE STATE OF IDAHO, IN AND FOR COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff, v. STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I THROUGH X, whose true identities are presently unknown, Defendants.	Case No. CV-OC-2007-17095 **MOTION FOR ADDITION TO CLERK'S RECORD ON APPEAL PURSUANT TO I.A.R. 29(a)**

COMES NOW, Defendant State of Idaho, Department of Health and Welfare, by and through its counsel of record, Brian Benjamin, Deputy Attorney General and hereby moves the Court pursuant to I.A.R. 29(a) for an Order adding the following documents to the Clerk's Record on Appeal in Supreme Court Case No. 37416:

///

///

ORIGINAL

From the Register of Actions (ROA) Report of Fourth Judicial District Court – Ada County:

06/15/09	Defendants' Motion for Summary Judgment
06/15/09	Affidavit of Monica Young
06/15/09	Affidavit of Bethany Zimmerman
06/15/09	Affidavit of Heidi Graham
06/15/09	Affidavit of Richard Armstrong
06/15/09	Affidavit of David Butler
06/15/09	Affidavit of Brian Benjamin
06/15/09	Affidavit of Mond Warren
06/15/09	Memorandum in Support of Defendants' Motion for Summary Judgment
06/15/09	Statement of Undisputed Facts
07/01/09	Affidavit of Lynette Patterson
07/08/09	Reply to Affidavit of Lynette Patterson
07/10/09	Affidavit of Jason RN Monteleone
07/10/09	Memorandum in Opposition to Defendants' Motion for Summary Judgment
07/10/09	Statement of Undisputed Facts in Opposition to Defendants' Motion for Summary Judgment
07/20/09	Reply to PL's Memorandum in Opposition to DF's Motion for Summary Judgment
10/07/09	Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim
10/07/09	Affidavit of Lynette Patterson in Support of Plaintiff's Motion
11/23/09	Defendants' Opposition to Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim

Defendant requests any incorporated attachments to any affidavits and/or documents to also be included with the affidavit and/or document.

Defendant hereby certifies that the above entitled case has been appealed to the Idaho Supreme Court, and that the above requested documents were not previously included in the Clerks Record, which was served on Defendants' April 6, 2010; that the Clerk's Record in this matter has not yet been settled and time to make corrections, additions and/or deletions before the District Court has not yet run. Finally, Defendants certify that the above requested documents are necessary for a full and fair appellate review of the District Court's Decision. In the event any objection is filed, oral argument is requested.

DATED this 26th day of April, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By Brian Benjamin
BRIAN B. BENJAMIN
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2010, I forwarded a true and correct copy of the foregoing by the following method to:

Jason R. N. Monteleone, Esq.
JOHNSON & MONTELEONE, LLP
405 S. 8th St., Ste. 250
Boise, ID 83702

☐ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Electronic Mail
☒ Facsimile: (208) 947-2424

Brian Benjamin
BRIAN B. BENJAMIN
Deputy Attorney General

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

THE STATE OF IDAHO, IN AND FOR COUNTY OF ADA

LYNETTE PATTERSON, Plaintiff, v. STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE and JOHN/JANE DOES I THROUGH X, whose true identities are presently unknown, Defendants.	Case No. CV-OC-2007-17095 **ORDER ON STIPULATION FOR ADDITION TO CLERK'S RECORD ON APPEAL PURSUANT TO I.A.R. 29(a)**

Having considered the Stipulation of the parties for addition to Clerk's Record on Appeal pursuant to I.A.R. 29(a) in this matter;

IT IS HEREBY ORDERED that the Stipulation for Addition to Clerk's Record on Appeal Pursuant to I.A.R. 29(a) is approved. The following documents from the Register of Actions (ROA) Report of Fourth Judicial District Court – Ada County shall be added to the Clerk's Record on Appeal in Supreme Court Case No. 37416:

06/15/09	Defendants' Motion for Summary Judgment
06/15/09	Affidavit of Monica Young
06/15/09	Affidavit of Bethany Zimmerman
06/15/09	Affidavit of Heidi Graham
06/15/09	Affidavit of Richard Armstrong
06/15/09	Affidavit of David Butler
06/15/09	Affidavit of Brian Benjamin
06/15/09	Affidavit of Mond Warren
06/15/09	Memorandum in Support of Defendants' Motion for Summary Judgment
06/15/09	Statement of Undisputed Facts

07/01/09	Affidavit of Lynette Patterson
07/08/09	Reply to Affidavit of Lynette Patterson
07/10/09	Affidavit of Jason RN Monteleone
07/10/09	Memorandum in Opposition to Defendants' Motion for Summary Judgment
07/10/09	Statement of Undisputed Facts in Opposition to Defendants' Motion for Summary Judgment
07/20/09	Reply to PL's Memorandum in Opposition to DF's Motion for Summary Judgment
10/07/09	Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim
10/07/09	Affidavit of Lynette Patterson in Support of Plaintiff's Motion
11/23/09	Defendants' Opposition to Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim

IT IS FURTHER ORDERED that any incorporated attachments to any affidavits and/or documents to also be included with the affidavit and/or document.

DATED this 10 day of MAY, 2010

By _____
HON. MICHAEL MCLAUGHLIN
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of May, 2010, I mailed (served) a true and correct copy of the within instrument to:

Jason R. N. Monteleone, Esq.
JOHNSON & MONTELEONE, LLP
405 S. 8th St., Ste. 250
Boise, ID 83702

Brian B. Benjamin, DAG
Office of Attorney General
P. O. Box 83720
Boise, ID 83720-0010

J. DAVID NAVARRO
Clerk of the District Court

By: INGA JOHNSON
Deputy Clerk